Supreme Court, U.S.
FILED

05-654 NOV 22 2005

OFFICE OF THE CLERK

In the Supreme Court of the United States

BRIAN DANIELS, AKA BRIAN TRIPLETT,

Petitioner,

v.

ALAN M. UCHTMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

C. JOHN KOCH
Counsel of Record
BRIAN D. HANSEN
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

QUESTIONS PRESENTED

In *Johnson v. United States*, -- U.S. --, 125 S. Ct. 1571 (2005), this Court resolved the issue of whether a state court decision can be a "fact" that triggers a one-year limitations period in federal habeas cases challenging the enhancement of a federal prisoner's sentence. This Court answered in the affirmative, holding that the limitations period in such cases "begins when a petitioner receives notice of the [state court] order vacating the prior conviction, provided that he has sought it with due diligence in the state court, after entry of judgment in the federal case with the enhanced sentence." *Id.* at 1575.

The questions presented in this petition are these:

1. Whether, in a case by a state prisoner involving newly discovered evidence, the one-year limitations period for a federal habeas claim is triggered when the prisoner obtains a final state-court adjudication regarding the new evidence that is contrary to federal law?

2. Whether a court should address the merits of a federal habeas petition establishing a credible claim of actual innocence, regardless of whether the petition is timely under the Antiterrorism and Effective Death Penalty Act?

PARTIES TO THE PROCEEDING

The parties appearing here and below are (1) Brian Daniels, aka Brian Triplett, the petitioner listed in the caption, and (2) Alan M. Uchtman, Warden at the Menard (Illinois) Correctional Center.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

A. Prior Proceedings 3

B. Proceedings Before The Seventh Circuit 4

C. The Decision Below 5

REASONS FOR GRANTING THE WRIT 7

I. There Is A Conflict In The Circuits Concerning Whether, In A Case Involving Newly Discovered Evidence Regarding A State Prisoner, A State-Court Adjudication That Is Contrary To Federal Law Is A Necessary Element Of A Federal Habeas Claim, Thereby Triggering The One-Year Limitation Period 8

A. Until There Is An Adjudication That Is Contrary To Federal Law, A State Prisoner Does Not Possess A Federal Habeas Claim.....8

B. The Decision Below Makes No Sense When The Case Involves Newly Discovered Evidence.....11

II. There Is A Conflict In The Circuits Concerning Whether A Court Should Address The Merits Of An Otherwise Untimely Habeas Petition When The Petition Establishes A Credible Claim Of Actual Innocence.....13

CONCLUSION.....17

Appendix A — Seventh Circuit Opinion.....1a

Appendix B — District Court Judgment.....6a

Appendix C — Illinois Supreme Court Denial of Review.....15a

Appendix D — Illinois Appellate Court Order Denying Post-Conviction Relief.....16a

Appendix E — Illinois Circuit Court Ruling Denying Post-Conviction Relief.....39a

Appendix F — Illinois Appellate Court Order.....46a

Appendix G — Illinois Circuit Court Trial Verdict.....59a

Appendix H – Text of 28 U.S.C. § 2244 ..... 64a

Appendix I – Text of 28 U.S.C. § 2254 ..... 67a

TABLE OF AUTHORITIES

CASES

Bellotti v. Baird, 443 U.S. 622 (1979) 16

Carey v. Saffold, 536 U.S. 214 (2002) 11, 12

Carter v. Litscher, 275 F.3d 663 (7th Cir. 2001) 12

David v. Hall, 318 F.3d 343 (1st Cir. 2003) 15

Eze v. Senkowski, 321 F.3d 110 (2d Cir. 2003) 8, 9

Flanders v. Graves, 299 F.3d 974 (8th Cir. 2002) 7, 13

Gibson v. Klinger, 232 F.3d 799 (10th Cir. 2000) 15

Gildon v. Bowen, 384 F.3d 883 (7th Cir. 2004) 7, 13

Herrera v. Collins, 506 U.S. 390 (1993) 15

Johnson v. United States, -- U.S. --, 125 S. Ct. 1571 (2005) ..... *passim*

Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001) 10

Ouber v. Guarino, 293 F.3d 19 (1st Cir. 2002) 8

Pace v. Diguglielmo, -- U.S. --, 125 S. Ct. 1807 (2005) 15

Schlup v. Delo, 513 U.S. 298 (1995) 8, 15, 16

Souter v. Jones, 395 F.3d 577 (6th Cir. 2005) 14, 16

Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005) 9

STATUTES

28 U.S.C. § 2244 ..... *passim*

28 U.S.C. § 2254 ..... *passim*

735 ILL. COMP. STAT. 5/2-1401(c) 11

725 ILL. COMP. STAT. 5/122-1(c) 11

PETITION FOR WRIT OF CERTIORARI

Petitioner Brian Daniels, aka Brian Triplett ("Daniels") respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The November 7, 2002 judgment of the Illinois Appellate Court affirming the trial court's order denying Daniels' state law post-conviction petition is unreported. (Pet. App. 16a-38a.) The Supreme Court of Illinois' February 5, 2003 decision denying Daniels' petition for leave to appeal is unreported. (Pet. App. 15a.) The April 26, 2004 decision of the United States District Court for the Northern District of Illinois denying Daniels' 28 U.S.C. § 2254 habeas petition as untimely is unreported. (Pet. App. 6a-14a.) The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court is reported at 421 F.3d 490 (7th Cir. 2005) and is reproduced at pages 1a to 5a of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on August 29, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which authorizes this Court to review a judgment of the Seventh Circuit denying a petition for writ of habeas corpus under 28 U.S.C. § 2254.

STATUTES INVOLVED

This case involves 28 U.S.C. § 2244 and 28 U.S.C. § 2254, which are reproduced at pages 64a to 70a of the Appendix.

In pertinent part, 28 U.S.C. § 2244 provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

In pertinent part, 28 U.S.C. § 2254 provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. *Prior Proceedings.*

In 1984, Petitioner Brian Daniels was convicted in an Illinois state court for the December 24, 1981 murder of Edward Knight. (Pet. App. 1a.) It is undisputed that the *sole* evidence at trial linking Daniels to the crime was the eyewitness testimony of a child — a newspaper delivery boy named Caston Rollins. (Pet. App. 8a.) Rollins, who was ten years old at the time of the crime and 12 years old at the time of Daniels' trial, testified at trial that he saw Daniels as part of a group of persons at the crime scene. (Pet. App. 8a.)

Fifteen years later, in 1999, Rollins (as an adult) executed an affidavit recanting his identification testimony concerning Daniels. (Pet. App. 9a.) Based on that newly discovered evidence of Rollins' false testimony, Daniels promptly filed a *pro se* Petition for Post-Judgment Relief Pursuant to Section 2-1401 of the Illinois Code of Civil Procedure in the Illinois Circuit Court for Cook County. (Pet. App. 19a-20a.) Daniels subsequently amended his *pro se* petition to add a claim for a *Brady v. Maryland* violation. (Pet. App. 19a-20a.) Daniels' *Brady* claim was based on Daniels' later discovery from Rollins that the State had failed to disclose impeachment evidence regarding a juvenile burglary charge pending against Rollins at the time Rollins testified against Daniels. (Pet. App. 20a.)

In January and March 2001, the Illinois circuit court conducted an evidentiary hearing and heard testimony from witnesses regarding the claims in Daniels' post-conviction petition. (Pet. App. 20a-27a.) At the January 2001 post-

conviction hearing before the state court, Rollins testified that his trial testimony, which identified Daniels as being outside Edward Knight's house on the morning of December 24, 1981, was false. (Pet. App. 22a.) Rollins testified that he indeed had witnessed a group of five men standing outside Knight's house on the morning of December 24, 1981, but that Rollins in fact never saw Daniels with the group. (Pet. App. 22a.) Rollins explained that as a child, he had testified falsely against Daniels because of repeated pressure from Chicago police detectives. (Pet. App. 22a.)

On March 26, 2001, the Illinois circuit court denied Daniels' post-conviction petition in its entirety. (Pet. App. 39a-45a.) The Illinois Appellate Court affirmed the circuit court's ruling on November 7, 2002. (Pet. App. 16a-38a.) The Illinois Supreme Court denied Daniels' petition for leave to appeal that decision on February 5, 2003. (Pet. App. 15a.)

Daniels filed with the district court a federal petition for a writ of habeas corpus under 28 U.S.C § 2254 on February 4, 2004, within one-year of the state court's final adjudication of his claims concerning the newly discovered evidence from Rollins. The district court dismissed Daniels' habeas petition as untimely under 28 U.S.C.§ 2244(d), holding that the state court's final adjudication concerning the newly discovered evidence did not trigger the one-year limitations period. (App. Pet. 9a-13a.) The district court further held that Daniel's "claims of actual innocence" were not relevant to the timeliness issue, citing *Flanders v. Graves*, 299 F.3d 974 (8th Cir. 2002). (App. Pet. 13a.)

B. *Proceedings Before The Seventh Circuit.*

Daniels appealed. In the Seventh Circuit, Daniels presented two basic arguments.

First, Daniels argued that his federal habeas petition was timely because it was premised upon newly discovered evidence. That evidence did not exist at the time of Daniel's original trial in 1984 and had never been considered by any state court until Daniels sought post-conviction relief in the Illinois court system. As a result, in accordance with 28 U.S.C. § 2244(d)(1)(D), the factual predicate for Daniels' federal habeas claims did not exist until February 5, 2003, when the state's highest court considered the newly discovered evidence and rejected it — thereby rendering, for the first time, an "adjudication of the claim" that was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) & (2).

Second, Daniels argued that, even if his claims could be deemed untimely under § 2244(d), the district court should have addressed the merits because he satisfied the "actual innocence" exception established by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995). Daniels contended that he satisfied the "actual innocence" standard because the only evidence ever presented against him was the testimony of a child, Caston Rollins, who was ten years old at the time of the events. As an adult, years later, Rollins voluntarily came forward and recanted, explaining that he had perjured himself as a child because Chicago police detectives had pressured him to do so.

C. *The Decision Below.*

While Daniel's Seventh Circuit appeal was pending, this Court decided *Johnson v. United States*, -- U.S. --, 125 S. Ct. 1571 (2005). In *Johnson*, this Court held that a state court decision can be a "fact" that triggers a new one-year limitations period under the 1996 amendments to the federal habeas statutes under the Antiterrorism and Effective Death

Penalty Act (the "AEDPA"). *Johnson* involved the one-year statute of limitations under 28 U.S.C. § 2255 ¶ 6(4), which is the counterpart to § 2244(d)(1) for prisoners in federal rather than state custody. The issue in *Johnson* was the triggering of the one-year limitations period for a prisoner's challenge to his federal sentence premised on the ground that a state conviction used to enhance that sentence subsequently had been vacated. *Id.* at 1574-75. This Court held that the one-year limitations period "begins when a petitioner receives notice of the [state court] order vacating the prior conviction, provided that he has sought it with due diligence in the state court, after entry of judgment in the federal case with the enhanced sentence." *Id.* at 1575. This Court emphasized that it may be "peculiar to speak of 'discovering' the fact of the very eventuality the petitioner himself as brought about [that is, the state court order vacating the prior conviction], but when that fact is necessary to the § 2255 claim, and treating notice of it as the trigger produces a more reasonable scheme than the alternatives, the scheme should be reconciled with the statutory language if it can be." 125 S. Ct. at 1580.

In its decision affirming the denial of habeas relief to Daniels, the Seventh Circuit held that, unlike the purported situation in *Johnson*, a state-court adjudication that is contrary to federal law is not "a necessary element of the petitioner's claim." (Pet. App. 4a.) According to the Seventh Circuit, "the state court's decision was not an element of Daniels' due process or *Brady* claims, but rather a procedural hurdle to clear before proceeding with his federal habeas petition." (Pet. App. 4a.) Because the state court's adjudication was not an "element" of the claim for federal habeas relief in the Seventh Circuit's view, the "state court decision . . . does not operate as the factual predicate of Daniels' claim." (Pet. App. 4a.) Accordingly, the Seventh Circuit held that the principle of *Johnson* did not apply

because the "factual predicate for Daniels' due process claim was the execution of Rollins' affidavit" in 1999 recanting his childhood testimony, rather than the state court's 2004 adjudication of that newly discovered evidence that was contrary to federal law. (Pet. App. 5a.)

With regard to Daniels' "actual innocence" contention — his argument that the district court erred in holding that "failure to comply with the one-year period of limitations fixed by § 2244(d)(1) is not excused by claims of actual innocence" (Pet. App. 13a) — the Seventh Circuit affirmed the district court's decision without expressly addressing the issue. The Seventh Circuit apparently affirmed because, in the meantime, the Seventh Circuit specifically had adopted the Eighth Circuit's decision on that point upon which the district court had relied. *Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004) (adopting the Eighth Circuit's holding in *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002), that actual innocence does not override the failure to comply with the AEDPA's one-year limitations period).

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the holdings of other circuits in two respects. *First*, the decision that a state-court adjudication contrary to federal law is not "a necessary element of the petitioner's claim" (Pet. App. 4a) conflicts with the holding of the Second Circuit. The Second Circuit has held that the existence of a state-court adjudication contrary to federal law is a non-waivable requirement of any federal habeas claim by a state prisoner. Under the Second Circuit's analysis, a state court's final decision on the issue is a substantive requirement, which accordingly triggers the limitations period under *Johnson*. *Second*, the decision below that the "failure to comply with the one-year period of limitations fixed by § 2244(d)(1) is not excused by claims of actual innocence" (Pet. App. 13a) conflicts with the holding

of the Sixth Circuit. Because this case rests on newly discovered evidence establishing a credible claim of actual innocence under the standard of *Schlup v. Delo*, 513 U.S. 298 (1995), the district court below should have reached the merits, regardless of the petition's timeliness.

I. There Is A Conflict In The Circuits Concerning Whether, In A Case Involving Newly Discovered Evidence Regarding A State Prisoner, A State-Court Adjudication That Is Contrary To Federal Law Is A Necessary Element Of A Federal Habeas Claim, Thereby Triggering The One-Year Limitation Period.

A. Until There Is An Adjudication That Is Contrary To Federal Law, A State Prisoner Does Not Possess A Federal Habeas Claim.

The Seventh Circuit's holding below — that a state-court adjudication contrary to federal law is not "a necessary element of the petitioner's claim" but rather is a "procedural hurdle to clear" (Pet. App. 4a) — conflicts with other Circuits' interpretation of the "adjudication" requirement of § 2254(d). The Second Circuit has held flatly that § 2254(d) "is not a procedural defense," but rather is a substantive requirement that cannot be "waived." *Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003). The First and Sixth Circuits likewise have interpreted § 2254(d) to be a substantive requirement, without which a federal habeas claim does not exist. *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002) ("Under the AEDPA, a federal court may grant habeas relief to a state prisoner *only if* the state court adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)")

(emphasis added); *Valentine v. Konteh*, 395 F.3d 626, 630 (6th Cir. 2005) ("In order for [Petitioner] to obtain federal habeas relief, he must demonstrate that his case satisfies the condition established by 28 U.S.C. 2254(d)(1)").

Under the views of those other circuits, a petitioner does not have a valid federal habeas claim unless and until "state court proceedings" are invoked and an "adjudication of the claim" is made that is contrary to federal law. 28 U.S.C. § 2254(d). Indeed, a state-court adjudication that is contrary to federal law is the *sine qua non* for any federal habeas claim.

In the Second Circuit's decision in *Eze*, the precise issue was whether § 2254(d) was a procedural rule that could be waived: "The gravamen of Eze's waiver argument is that procedural defenses can be waived if not raised by the defendant." *Eze*, 321 F.3d at 121. The Second Circuit held that § 2254(d) "is not a procedural defense," but rather is "a standard of general applicability for all petitions filed by state prisoners after the statute's effective date." 321 F.3d at 121.

Daniels' case here involves newly discovered evidence. Unlike a typical habeas petitioner, who generally receives an "adjudication" and knows whether the requirements of § 2254(d) are satisfied at the conclusion of his state court direct appeal, Daniels' habeas claims were premised on newly discovered evidence arising long after his original conviction. Accordingly, Daniels' claims could not qualify as valid federal habeas claims under § 2254(d) unless and until a state court heard them and adjudicated them in a way that was "contrary to . . . clearly established Federal law" or was based on an "unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) & (2).

That is exactly what Daniels did. On February 5, 2003, the Illinois Supreme Court denied Daniels' petition for leave

to appeal and, for the first time, created a final state court decision resolving his claims concerning the newly discovered evidence. It was at that point — and not before — that Daniels discovered that the state court had made a final "adjudication" of the claim under § 2254(d) that was contrary to federal law. Until that date, Daniels did not possess, and thus could not have discovered or asserted, his federal habeas claims because, given the requirements of § 2254(d)(1) & (2), they did not yet exist. Accordingly, Daniels' one-year habeas statute of limitations began to run on February 5, 2003, the first date that the factual basis for his federal habeas claims could have existed and been discovered. 28 U.S.C. § 2244(d)(1)(D).

This Court already has resolved in *Johnson* the question of whether a state court decision can constitute a "fact" for purposes of triggering the AEDPA's one-year limitations period. This Court held that it can. This Court recognized that it may be "peculiar to speak of 'discovering' the fact of the very eventuality the petitioner himself as brought about" — namely, the state court decision vacating the petitioner's prior conviction. *Johnson*, 125 S. Ct. at 1580. However, this Court concluded that "when that fact is necessary to the § 2255 claim, and treating notice of it as the [limitations] trigger produces a more reasonable scheme than the alternatives, the scheme should be reconciled with the statutory language if it can be." *Id.* [1]

The "fact" of a final state court adjudication is as "necessary" here as it was in *Johnson*. The prisoner in *Johnson* could not proceed with a federal habeas petition unless and until he obtained a state-court adjudication

---

[1] Section 2255 ¶ 6(4) and § 2244(d)(1)(D) are essentially identical, and this Court has interpreted those two limitations provisions in concert with one another. *See, e.g., Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 402 (2001) (plurality op. of O'Connor, J.).

invalidating his prior conviction under state post-conviction review. Here, Daniels likewise could not proceed with a federal habeas petition unless and until he obtained a state-court adjudication — one that violated federal law. Like Daniels' petition in this case, the petitioner's claim in *Johnson* did not exist, and therefore could not trigger the one year limitations period, until Johnson first obtained a final adjudication of that claim under state law.

B. The Decision Below Makes No Sense When The Case Involves Newly Discovered Evidence.

The Seventh Circuit's application of § 2254(d) as a "procedural hurdle" rather than a substantive requirement makes no sense in a case involving newly discovered evidence that has not previously been heard or adjudicated by a state court. In cases involving newly discovered evidence, the Seventh Circuit's view would make a petitioner's federal claims untimely before they conceivably could exist. For example, the Illinois Relief from Judgment statute, 735 ILL. COMP. STAT. 5/2-1401(c), allows a defendant *two years* from the time he discovers new, fraudulently concealed evidence in which to file a petition for relief. Similarly, the Illinois Post-Conviction Act, 725 ILL. COMP. STAT. 5/122-1(c), provides that a defendant may file a petition at any time as long as the defendant alleges facts showing that any delay in filing was not caused by the defendant's culpable negligence. Under the Seventh Circuit's decision, a petitioner such as Daniels who timely invoked "state court proceedings" on a claim under § 2254(d) nevertheless would be time-barred from seeking federal habeas relief before the "adjudication of the claim" giving rise to the federal claim even occurred.

This Court has warned against interpretations of the AEDPA that mandate the filing of premature federal habeas petitions. *Carey v. Saffold*, 536 U.S. 214, 220 (2002). In *Carey*, this Court rejected California's restrictive interpre-

tation of the term "pending" under § 2244(d)(2) of the AEDPA because it promoted premature federal petitions:

> California's interpretation violates these principles [promoting exhaustion] by encouraging state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review. This would lead to great uncertainty in the federal courts, requiring them to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations).

Id. (emphasis in original).

Contrary to the reasoning of the Seventh Circuit, applying § 2254(d) as a substantive requirement for relief in fact would establish a concise and objective trigger for the AEDPA's one-year limitation period in cases involving newly discovered evidence. That trigger is the date of the state court's final "adjudication" of the claim regarding the newly discovered evidence. Such a trigger does not contradict "the provision [under § 2244(d)(2)] tolling the limitation during the pendency of the state claim," as the Seventh Circuit suggested. (Pet. App. 4a-5a.) The tolling provision in § 2244(d)(2) is applicable in other types of habeas cases, unlike this one, where state law permits further post-conviction review of an adjudication affecting potential federal claims or where a defendant pursues a state petition based on purely state-law issues. *See, e.g., Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001) ("A state collateral proceeding based solely on state-law issues may avoid the need for federal relief, and a tolling rule permits prisoners to pursue such theories in state court without

jeopardizing their ability to raise the federal constitutional issues later in federal court, if that proves to be necessary").

In sum, when a fact "is necessary to the . . . claim, and treating notice of it as the trigger produces a more reasonable scheme than the alternatives, the scheme should be reconciled with the statutory language if it can be." *Johnson*, 125 S. Ct. at 1580. Daniels' position flows directly from the statutory scheme established by the AEDPA and is in harmony with the statute's language. Under the statutory scheme, before a § 2254 habeas claim exists, a final state court "adjudication" must occur that was "contrary to . . . clearly established Federal law" or "based on an unreasonable determination of the facts in light of the evidence presented." This Court should resolve the Circuit split and confirm the substantive nature of § 2254(d).

II. There Is A Conflict In The Circuits Concerning Whether A Court Should Address The Merits Of An Otherwise Untimely Habeas Petition When The Petition Establishes A Credible Claim Of Actual Innocence.

The Circuits are hopelessly conflicted on the issue of whether a credible claim of actual innocence surmounts the timeliness requirements of the AEDPA The district court in this case held that "failure to comply with the one-year period of limitations fixed by § 2244(d)(1) is not excused by claims of actual innocence." (Pet. App. 13a (citing *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002).) The Seventh Circuit affirmed the district court's decision without expressly addressing the issue, apparently because the Seventh Circuit in the meantime specifically had adopted the Eighth Circuit's *Flanders* decision upon which the district court had relied. *Gildon v. Bowen*, 384 F.3d 883, 887-88 (7th Cir. 2004) (adopting the Eighth Circuit's holding in

Flanders that actual innocence does not override the failure to comply with the AEDPA's one-year limitations period).

The Sixth Circuit has held precisely the opposite: "[W]e hold that where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims." *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005). In reaching that result, the Sixth Circuit acknowledged that it was parting company with the Eighth Circuit's *Flanders* decision (*id.* at 601 n.16):

> We decline to adopt the approach outlined by the Eighth Circuit in *Flanders*, which imposes a requirement that the petitioner show "action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion or . . . that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations." 299 F.3d at 978.... The *Flanders* exception would not cover situations as in this case where the petitioner had collected sufficient evidence to demonstrate a credible claim of actual innocence but failed to file within the one-year limitations period.

The Sixth Circuit in *Souter* collected cases from additional Circuits that likewise "have recognized that denying federal habeas relief from one who is actually innocent would be constitutionally problematic." *Souter*, 395 F.3d at 601 (citing cases from the Second, Third, and Eleventh Circuits).

Other Circuits that have addressed the issue have held that the actual innocence standard does not apply to the

AEDPA's limitations period, or, like the Seventh Circuit, does not apply as a freestanding exception in the absence of a showing of diligence or cause for the delay. *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003) (habeas petitioners "who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming"); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (tolling appropriate "when prisoner is actually innocent" and "diligently pursue[s] his federal habeas claims").

This Court has acknowledged that it has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." *Pace v. Diguglielmo*, -- U.S. --, 125 S. Ct. 1807, 1814 n.8 (2005). Prior to the enactment of the AEDPA, this Court held that a claim of actual innocence can be raised "to avoid a procedural bar to the consideration of the merits of [the habeas petitioner's] constitutional claims." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). An actual innocence claim under *Schlup* is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

In *Schlup*, this Court held that if a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup*, 513 U.S. at 316. The threshold inquiry is whether "new facts raise[] sufficient doubt about [the habeas petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable

juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The actual innocence exception should "remain 'rare'" and "only be applied in the 'extraordinary case'" where the standard is satisfied. *Id.* at 321.

This case is the rare and extraordinary case contemplated in *Schlup* where the petitioner has presented new evidence that raises sufficient doubt about his guilt to undermine confidence in the result of his trial. The *sole* evidence at trial linking Daniels to the crime was the eyewitness testimony of a child. *Cf. Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (recognizing the "peculiar vulnerability of children" and "their inability to make critical decisions in an informed, mature manner"). That child, as an adult, recanted his trial identification testimony, attributed his false trial testimony to repeated pressure from Chicago police detectives, and testified that Daniels in fact was *not* one of the individuals he witnessed at the crime scene. Given the recantation of the sole evidence against him, Daniels clearly satisfies *Schlup*'s "more likely than not" standard. *See Souter*, 395 F.3d at 593 n.8 (6th Cir. 2005) ("A prosecution witness recanting his trial testimony certainly falls under that scope" of the *Schlup* standard); *see also Schlup*, 513 U.S. at 330 ("the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial").

The question concerning the effect of actual innocence will not be further refined or resolved by additional percolation among the Circuits. The question is discrete and has been decided in opposite ways. Again, this Court should resolve the conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

C. JOHN KOCH
Counsel of Record
BRIAN D. HANSEN
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

November 22, 2005

APPENDIX

Appendix A

United States Court of Appeals,
Seventh Circuit

BRIAN DANIELS, aka BRIAN TRIPLETT, Petitioner-Appellant,

v.

ALAN M. UCHTMAN, Respondent-Appellee.

No. 04-2574

ARGUED MARCH 30, 2005
DECIDED AUGUST 29, 2005

OPINION

Before BAUER, RIPPLE, AND KANNE, *Circuit Judges*.

BAUER, *Circuit Judge*.

In 1984, Brian Daniels was convicted of murder and sentenced to 30 years in prison. Fifteen years later, the primary eyewitness for the prosecution recanted his testimony. Furthermore, Daniels learned that the witness was facing a juvenile burglary charge at the time of his testimony, which the prosecution failed to disclose. Based on these new developments, Daniels unsuccessfully sought post-conviction relief in state court, then filed a petition for writ of habeas corpus in federal court. The district court dismissed the petition as untimely under 28 U.S.C. § 2244(d)(1)(D). We affirm.

I. Background

Daniels was convicted for the December 24, 1981 murder of Edward Knight. The prosecution's primary witness was a

boy named Caston Rollins, who was 10 years old at the time of the murder and 12 years old at trial. Rollins testified that he saw Daniels and some other boys breaking into the victim's house that morning. Fifteen years later, on June 25, 1999, Rollins executed an affidavit recanting his trial testimony. He stated that he was prompted to come forward after being contacted by Daniels' representatives. On October 27, 1999, Daniels filed for relief in state court. The trial court denied his post-conviction petition. The appellate court affirmed, and the Illinois Supreme Court denied leave to appeal on February 5, 2003. Daniels filed his federal habeas petition on February 4, 2004. He brings a due process claim based on Rollins' affidavit and a *Brady* claim based on the prosecution's failure to disclose evidence regarding Rollins' pending juvenile charge and its representations to Rollins that it would provide assistance to him on that charge.

The district court dismissed Daniels' petition as time-barred under 28 U.S.C. § 2244(d)(1)(D). The petition was due one year after "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *Id.* The issue on appeal is what constitutes the "factual predicate" of Daniels' claims. The district court held that the execution of Rollins' affidavit on June 25, 1999, was the factual predicate for Daniels' claims. Daniels argues that the factual predicate for his claims was not "discovered" until the date of the Illinois Supreme Court decision, February 5, 2003.

The district court reasoned that a state court decision is a procedural requirement, not a factual predicate for Daniels' claims. As such, the one-year limitations period began to run when Rollins executed his affidavit. Under that rationale, the statute ran for a total of 123 days from the signing of the

affidavit until Daniels filed for relief in state court.[1] At that point, the statute was tolled. After the Illinois Supreme Court denied relief, the statute began to run again, this time for 364 days until Daniels filed his habeas petition. In the view of the district court, a total of 487 days elapsed after the date on which the factual predicate of Daniels' claims had been discovered, making his habeas petition untimely.

Daniels contends that since he could not file his federal habeas claim until the state court had ruled, the one-year statute of limitations began to run on February 5, 2003, the date the Illinois Supreme Court denied leave to appeal. By his rationale, only 364 days elapsed and his petition was timely.

II. Discussion

Shortly after oral argument in this case, the Supreme Court decided *Johnson v. United States*, 125 S.Ct. 1571 (2005). In *Johnson*, the petitioner received an enhanced sentence on his federal drug conspiracy conviction based on his prior state court convictions. After successfully moving to vacate his state court convictions, he filed for federal habeas relief on the basis that the vacatur of his state convictions required vacatur of his enhanced federal sentence.[2] Johnson filed his petition after the one-year grace period set out by the AEDPA, but he argued that the order

---

[1] The district court erroneously calculated that the statute had run for 160 days. The error is insignificant; under the district court's analysis, Daniels' petition would still be untimely using the correct figure of 123 days.

[2] Since the petitioner in *Johnson* was a federal prisoner, his claims are governed by 28 U.S.C. § 2255, ¶ 6(4). This is the counterpart to § 2244(d)(1)(D); the provisions are virtually identical and the Supreme Court has interpreted the statute of limitations provisions interchangeably. *See Shannon v. Newland*, 410 F.3d 1083, 1088 (9th Cir. 2005).

vacating the state court conviction was a "new fact" and triggered a new limitations period. The Eleventh Circuit rejected the argument, holding that a state court order was not a "fact" as contemplated by § 2255.

The Supreme Court, while affirming on other grounds, held that the vacatur of Johnson's prior state conviction was a matter of fact for purposes of the one-year limitations period set out in § 2255. The Court addressed the narrow question of what "facts" affecting an enhanced sentence most reasonably fit into the language of the limitation provision of § 2255, which states that the one-year limit begins to run from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 125 S.Ct. at 1578. Ultimately, the Court noted that it is "peculiar to speak of 'discovering' the fact of the very eventuality the petitioner himself has brought about, but when that fact is necessary to the § 2255 claim, and treating notice of it as the trigger produces a more reasonable scheme than the alternatives, the scheme should be reconciled with the statutory language if it can be." 125 S.Ct. at 1580.

The situation in the instant case is distinguishable from *Johnson*. In *Johnson*, the state court decision vacating his state convictions supplied a necessary element of the petitioner's claim. Here, the state court's decision was not an element of Daniels' due process or *Brady* claims, but rather a procedural hurdle to clear before proceeding with his federal habeas petition. The state court decision plays a different role here; it does not operate as the factual predicate of Daniels' claim. Treating the state court decision as the trigger for a renewed one-year period does not produce a reasonable scheme in the instant case. Rather, it would significantly undermine the one-year statute of limitations and render the provision tolling the limitation during the

pendency of the state claim meaningless. The factual predicate for Daniels' due process claim was the execution of Rollins' affidavit; his petition was untimely and was properly dismissed.

Daniels further argues that his *Brady* claim is timely since he did not learn of the burglary charge against Rollins until September 26, 2000. This argument is unpersuasive. Daniels, through his representatives, contacted Rollins at some point before Rollins signed his affidavit on June 25, 1999. Even though the facts surrounding Rollins' burglary charge were not actually discovered by Daniels' counsel until an interview in September 2000, Daniels could have discovered the information supporting his *Brady* claim at least as early as June 1999. Section 2244(d)(1)(D) requires the petitioner to exercise due diligence in discovering the factual basis for his claims. Daniels failed in this respect, and his *Brady* claim was properly dismissed as untimely.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the district court dismissing Daniels' petition as untimely.

Appendix B

United States District Court
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *ex rel.*
BRIAN DANIELS, a/k/a BRIAN TRIPLETT, Plaintiff,

v.

EUGENE McADORY, Defendant.

No. 04 C 888

April 26, 2004

CONLON, District Judge

MEMORANDUM OPINION AND ORDER

Brian Daniels, a/k/a Brian Triplett ("Daniels") was convicted for the Christmas Eve 1981 murder of Edward Knight. Daniels' conviction was based on eyewitness testimony of a then ten year old boy, Caston Rollins. Rollins testified he saw Daniels directing a group of six boys breaking into Knight's house. Almost 20 years later, Daniels filed a state petition for post-conviction relief because Rollins recanted his testimony. Rollins attested that he never saw Daniels in front of Knight's house. Daniel's state post-conviction appeals having been denied, he petitions for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

After a state bench trial in 1984, Daniels was convicted of three counts of murder, burglary and home invasion. He

was sentenced to 30 years in prison for the murders and 25 years for the home invasion, to be served consecutively. Pet at 2; Pet. Ex. 7 at 2. The Illinois Appellate Court affirmed his conviction for the murder of Edward Knight, reversed and vacated two other murder convictions and remanded the case to the trial court for clarification of the *mittimus* as to the consecutive nature of the murder sentence. *Id.* The record does not indicate what occurred in subsequent proceedings. In any case, Daniels did not seek leave to appeal to the Illinois Supreme Court.

Daniels filed for state post-conviction relief on October 27, 1999.[1] After an evidentiary hearing, the trial court denied Daniels' post-conviction petition. The Illinois Appellate Court affirmed. Pet. Ex. 7. The Illinois Supreme Court denied leave to appeal. Pet. Ex. 8. Daniels filed this petition for writ of *habeas corpus* approximately one year later, on February 4, 2004. He alleges he is entitled to relief because: (1) his conviction was based on the perjured testimony of a 12 year old boy; (2) the state improperly failed to turn over impeachment evidence against the key witness; (3) trial counsel's failed to call alibi witnesses in violation of his Sixth Amendment right to effective assistance of counsel; and, (4) the cumulative effect of these trial errors violated Daniel's right to due process. In lieu of answering Daniels' petition on the merits, the state moves to dismiss the petition as time-barred.

BACKGROUND

Daniels' petition depends on credibility assessments. The crucial issue is whether the recantation testimony of the state's key witness is more reliable than the testimony the

---

[1] Initially, Daniels filed his state petition *pro se*. In November 1999, Jenner & Block, LLP came to Daniels' aid. Daniels is ably represented by C. John Koch and Brian Hansen of that firm in these proceedings.

witness gave at trial as a 12 year-old boy in 1984. Because the details of the 1984 trial are undisputed, the court adopts the Illinois Appellate Court's summary of those facts. 28 U.S.C. § 2254(e)(1).

Daniels was convicted for the 1981 murder of Edward Knight at a bench trial. His conviction was based on the eyewitness and identification testimony of a then 12 year old boy, Caston Rollins. Rollins testified that at 7:00 a.m. on Christmas Eve, he left his home to deliver newspapers with his friend, Frank Reml. Pet. Ex. 7 at 3. It was the first time he went on Reml's route. *Id.* As Rollins and Reml approached the corner of 54th place and Hoyne Avenue, Rollins noticed six boys standing out Knight's house. *Id.* Rollins recognized the faces of several of the boys from the neighborhood, including Daniels. *Id.* Rollins testified that Daniels was giving orders to the other boys. One of the boys Rollins recognized as Jo-Jo was sent to the rear of the house with wirecutters. *Id.* The boys then entered the home using a crowbar. *Id.* Rollins testified that Daniels stayed outside, functioning as a lookout in the back of the house. *Id.* About ten minutes later, the boys exited Knight's house and dispersed. Jo-Jo ran by Rollins carrying a television set. He told Rollins not to tell the police where he obtained the set. *Id.*

Daniels' attorney cross-examined Rollins about the circumstances surrounding his identification of Daniels at the scene and in subsequent conversations with Chicago Police Detectives. Pet. Ex. 4 at c145-157, c174-181 (trial transcript). Rollins was questioned about his incomplete and possibly contradictory description of the boys surrounding the house. *Id.* at c 145-157. Daniels' attorney explored his theory that Rollins' identification was tainted by police detectives. Rollins admitted police detectives took him away from home to a candy store for questioning and to show him

photographs of potential suspects. *Id.* at 174-181. The state never disclosed that Rollins had been arrested for burglary 17 days before testifying at Daniels' trial. Pet. Ex. 1, R. Vol. 1, 81.

Fifteen years later, on June 25, 1999, Rollins recanted his trial testimony. Pet. Ex. 2. He stated that he was contacted by Daniels' representatives that year, and that this prompted him to come forward. *Id.* Rollins attested that he did not see Daniels outside the Knight home on the morning of December 24, 1981, and that his false testimony was the product of police and prosecutorial coercion. *Id.*

DISCUSSION

1. Timeliness of Daniels' Petition

Under § 2244(d)(1)(D), Daniels' petition was due one year after "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." The parties disagree on the application of § 2244(d)(1)(D) to Daniels' petition. The state contends Daniels waited too long to file his petition after he became aware of Rollins' recantation. The state takes the position that the one-year period commenced the day Daniels discovered the factual predicate of his recantation claim: Rollins' affidavit. Rollins executed his affidavit June 25, 1999. Daniels filed his state post-conviction petition on October 27, 1999. Under the state's interpretation, the statute ran for 169 days. Once Daniels filed his state post-conviction petition, the statute was tolled pursuant to § 2244(d)(2). The statute began to run again after the Illinois Supreme Court denied Daniels' petition for leave to appeal on February 5, 2003. Accordingly, when Daniels filed his § 2254 petition 364 days later on February 4, 2004, it was untimely. Daniels argues this interpretation of § 2244(d)(1)(D) is flawed. He asserts that the one-year

period began when the state courts rejected his post-conviction petition on February 5, 2003 – the day his claims were primed for federal *habeas* review.

Essentially, Daniels contends the factual predicate for his *habeas* claim was not uncovered until his post-conviction petition was rejected by the state court because his federal *habeas* claim requires a showing that the state court's decision was an unreasonable determination of the facts. In support of his position, Daniels cites a decision of this court considering a similar issue, *Surrat v. Boyd*, No. 99 C 7750, 2000 WL 748138, at *3 (N.D. Ill. 2000). In *Surrat*, the court addressed the conviction of a prisoner who exhausted the direct appeal process prior to enactment of the AEDPA on April 24, 1996. *Id.* at *2. The state argued that Surrat's petition, subject to § 2244(d)(2)'s tolling provisions, was due in federal court one year later. *Id.* The court found otherwise, ruling that:

> Since April 1996, part of the basis of a valid federal *habeas corpus* claim has been a showing that the state court's decision on the petitioner's claim was based on an unreasonable determination of the facts in light of the evidence presented or was contrary to clearly established federal law as determined by the Supreme Court.

Id. at *3 (italics added). According to the court, Surrat was incapable of discovering the factual basis for his claims until the state court rejected his post-conviction petition. *Id.*

Surrat was decided without the benefit of subsequent Seventh Circuit authority. A state court decision is not a factual predicate for Daniels' claims; it is a procedural requirement determining the claims' eligibility for consideration by a federal court. *See Brackett v. United*

States, 270 F.3d 60, 68 (1st Cir. 2001) (distinguishing "basic, primary, or historical facts" from "court decisions" in the context of § 2255(4), a parallel provision to § 2244(d)(1)(D)); *accord Johnson v. United States*, 340 F.3d 1219 (11th Cir. 2003); *but see United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003). Although it has not considered this particular application of § 2244(d)(1)(D), the Seventh Circuit has clearly expressed that the natural operation of the provision turns on evidentiary facts or events, not court rulings or legal consequences of the facts. *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000). *Owens* held that § 2244(d)(1)(D) is an equitable tolling provision subject to an objective trigger: time begins when the prisoner could have discovered the important facts underlying his claim. *Id.* Under Daniel's interpretation, the one-year limitation period would depend on a much different objective trigger: the conclusion of state post-conviction review. His attempt to paste an expansive judicial gloss on the meaning of "factual predicate" would render the factual discovery limitation meaningless, substantially increasing the number of potentially stale claims the state must defend. *Compare Owens*, 235 F.3d at 359, *with Surrat*, 2000 WL 748138 at *3. The plain language of § 2244(d)(1)(D) compels this court to find that Daniels' one-year period to file his federal *habeas* petition began the day Rollins executed his affidavit.[2] Accordingly, Daniel's claims based on Rollins recantation testimony are untimely.

Daniels argues that a determination that he was dilatory in presenting some of his claims is not dispositive because in considering the timeliness of a *habeas* petition, courts are

---

[2] This court's reading of Seventh Circuit authority is buttressed by the Fifth Circuit's decision in *Ybanez v. Johnson*, 204 F.3d 645, 646 (5th Cir. 2000), holding that the asserted erroneous state court's disposition of a state *habeas* application was not a factual predicate for purposes of § 2244(d)(1)(D).

directed to contemplate the application as a whole, not individual claims. *Walker v. Crosby*, 341 F.3d 1240, 1244-45 (11th Cir. 2003); *see also Artuz v. Bennett*, 531 U.S. 4, 9-10, 121 S. Ct. 361 (2000) (distinguishing particular claims from application). The court considers Daniels' petition in light of his last discovered claims. *Id.*

Daniels contends his *Brady* claim is timely because he was unaware of Rollins' burglary arrest until Rollins informed his post-conviction attorneys on September 26, 2000. Pet. Ex. B, Ashley Decl. However, the § 2244(d)(1)(D) limitation period begins when the petitioner *could* have learned of the factual basis for his claim; due diligence is required. *Owens*, 235 F.3d at 359. Although Daniels did not allege *Brady* claims until 2000, he first alleged Rollins' testimony was the product of coercion at his original trial in 1984. Pet. Ex. 4 at c174. Daniels argues that his incarceration and the limited availability of information regarding Rollins' arrest excuses his late discovery. However, the record does not suggest, nor does Daniels allege, that Rollins stone-walled Daniels. Indeed, Rollins' affidavit states that his testimony was the product of both police and prosecutorial coercion. Pet. Ex. 2. Daniels' claim accrued when he had putative knowledge of the pertinent facts, not after he collected evidence and affidavits supporting the facts. *Flanagan v. Johnson*, 154 F.3d 196, 198-99 (5th Cir. 1998). Given Rollins' willingness in 1999 to cooperate with Daniels' defense, due diligence could have uncovered Rollins' arrest history. *Tate v. Pierson*, 177 F. Supp.2d 792, 800 (N.D. Ill. 2001), *aff'd*, 52 Fed. Appx. 302, 2002 WL 31688938 (7th Cir. Nov. 25, 2002) (unpublished decision), *cert. denied*, 538 U.S. 965 (2003). Daniels *could* have learned of Rollins' arrest as early as June 25, 1999.

Daniels contends the late discovery of facts underlying his claim the state knowingly used perjury renders his

petition timely. To begin with, Daniels does not clearly identify this claim in his petition. He merely asserts his conviction relied on perjured testimony. Even if the court assumes the petition asserts this claim, the allegation would rest on the same factual predicate as his due process and *Brady* claims: Rollins' recantation. Because Daniels' perjury claim is based on Rollins' recantation, Daniels fails to demonstrate that he was incapable of discovering the factual predicate of his claim until he amended his state petition in 2000. *Tate*, 177 F. Supp.2d at 800.

2. Equitable Tolling

Daniels argues that even if his petition is untimely, the limitation period should be equitably tolled because he is actually innocent, he was prevented from filing his state petition in a timely manner for fear of losing good time credit, and because the state waived its procedural defenses by filing its response to the *habeas* petition 25 days late. First, failure to comply with the one-year period of limitations fixed by § 2244(d)(1) is not excused by claims of actual innocence. *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002); *Barnes v. Briley*, 295 F. Supp.2d 931, 937 (N.D. Ill. 2003). Nor is Daniels' fear of losing good time credit an external impediment that precluded timely filing of the petition. *Modrowski v. Mote*, 322 F.3d 965, 967 (7th Cir. 2003) ("Equitable tolling excuses an untimely filing when extraordinary circumstances far beyond the litigant's control . . . prevented timely filing"). Daniels overlooks the fact that even if his fear explains the delay in filing his *state* petition, it does not explain why he waited a year after the Illinois Supreme Court denied leave to appeal before filing his *federal* petition. Finally, the court finds that precluding the state from asserting that Daniels' claims are time-barred is an inappropriate sanction for the state's tardiness in responding to the petition. Barring presentation of

procedural defenses and forcing the state to defend stale claims is a disproportionate sanction for failing to file a timely response. *See Blaltner v. Welborn*, 15 F.3d 652, 653-54 (7th Cir. 1994).

CONCLUSION

Daniels became aware of the factual predicates for his claims the day Rollins executed an affidavit recanting his identification testimony at Daniels' trial: June 25, 1999. Under § 2244(d)(1), the time for filing a *habeas* petition in federal court expired one year later. He filed his state petition 169 days later on October 27, 1999. Although the statute was tolled while Daniels' application was pending in state court, the statute ran again beginning on February 6, 2003, the day after litigation on the post-conviction petition ended in state court. Daniels' failure to file this § 2254 application until February 4, 2004 after the total elapse of 533 days means his claims are time-barred. Accordingly, the petition for writ of *habeas corpus* must be denied.

Appendix C

SUPREME COURT OF ILLINOIS

February 5, 2003

NO. 95344 - People State of Illinois, respondent, v. Brian Triplett, etc., petitioner, Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 2003.

Appendix D

State Of Illinois Court Of Appeals, First District

PEOPLE OF THE STATE OF ILLINOIS

v.

BRIAN TRIPLETT a/k/a BRIAN DANIELS

1-01-1524

November 7, 2002

Before Hartman, J., Theis, P.J., and Greiman, J.

ORDER

Petitioner, Brian Triplett, a/k/a Brian Daniels, appeals the denial of his petition for post-judgment and post-conviction relief. Petitioner was one of six men charged with the December 24, 1981 murder of Edward Knight, and other numerous counts of armed robbery, residential burglary, home invasion and armed violence based on murder, home invasion, armed robbery and residential burglary. Following a bench trial, defendant was found guilty on three counts of murder, and one count each of home invasion and burglary. He was sentenced to concurrent prison terms of 30 years for murder and 25 years for home invasion, to be served consecutive to "any sentences [he] receive[s] in other cases."

On direct appeal, this court affirmed one of petitioner's murder convictions, reversed and vacated two other murder convictions, and remanded the case to the circuit court for an amendment of the *mittimus* to clarify the consecutive nature

of the murder sentence. *See People v. Daniels*, No. 84-0997 (1985) (unpublished order under Supreme Court Rule 23).[1]

On November 1, 1999, defendant filed a *pro se* petition for post-judgment relief pursuant to Code of Civil Procedure section 2-1401 (735 ILCS 5/2-1401 (West 2000) (section 2-1401)), which later was amended by counsel to include an alternative request for post-conviction relief (725 ILCS 5/122-1 (West 2000)). Following a hearing, the circuit court denied the petition. Petitioner appeals.

Petitioner questions for review whether: (1) he was denied a fair trial and due process of law through the State's alleged use of perjured testimony at trial; (2) the circuit court abused its discretion by allowing the State to elicit testimony that the sole occurrence witness was a gang member; (3) he was denied effective assistance of trial counsel because of counsel's failure to present the testimony of two alibi witnesses; (4) a violation pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) (*Brady*) occurred; and (5) he is entitled to a new trial based on the cumulative effect of newly discovered evidence presented at his post-conviction hearing.

At petitioner's January 1984 trial, Caston Rollins, then 12 years old, testified that at 7:00 a.m. on December 24, 1981, he left his home to deliver newspapers with his friend, Frank Reml. It was daylight. As Rollins approached the corner of 54th Place and Hoyne Avenue, he observed six boys

---

[1] On remand, the circuit court amended the original sentencing order to show that the 30-year murder sentence was to be served consecutively with a 120-year sentence from an unrelated case in which petitioner was convicted of home invasion, armed robbery and aggravated battery. In *People v. Daniels*, 173 Ill. App. 3d 752, 759, 527 N.E.2d 993 (1988), this court affirmed petitioner's 60-year and five-year sentences for the offenses committed in the unrelated case, but modified the judgment to provide for those sentences to run concurrently on those counts and run consecutively with his 30-year murder sentence.

attempting to enter a house. Rollins identified petitioner, whom he previously had seen around the neighborhood, as the youth who was giving orders to the others. Petitioner told two of the youths to try to enter the front door and ordered another boy, whom Rollins knew as Jo-Jo, to go to the back of the house. When Jo-Jo returned, wire-cutters in hand, he told petitioner that the wires were cut. One of the boys forced open the door with a crowbar and entered with three others, while two remained outside stationed in front and in back of the home. Rollins stated that, although he was standing closest to the youth who was functioning as the lookout in front of the house, he could see that petitioner was the lookout in the back of the house. After ten minutes, the four boys exited the home with Jo-Jo carrying a television set. They ran across Garfield Boulevard. As Jo-Jo ran by, he told Rollins not to tell the police where he obtained the television set.

Rollins further testified that one month after the incident, the police came to his house for questioning, took him to a candy store and showed him 19 photographs. Rollins then picked out five photographs, identifying petitioner and co-defendants David Hartsfield, Floyd Miller, Ernest Simon and Kevin (Jo-Jo) Haymore. When asked by the assistant State's attorney (ASA) why he chose the five photographs, Rollins responded, "because they were there." Rollins stated that the police officers did not tell him which photographs to select. According to Rollins, after his identification of the offenders, he did not meet again with investigators until one year later.

On cross-examination, Rollins admitted telling Chicago Police Detective Thomas O'Connor that Hartsfield was at the back of the house, but petitioner switched places with Hartsfield when the youths entered so that petitioner remained outside.

Reml, also then 12 years old, testified that on December 24, 1981, he was delivering newspapers with Rollins. Reml delivered newspapers on Garfield Boulevard while Rollins walked toward 54th Place. When Reml rejoined Rollins at 54th Place and Hoyne Avenue, he saw six youths running together, with one holding a television set. He observed one of the youths say something to Rollins.

Detective O'Connor testified that neither he nor his partner, Detective James Higgins, told Rollins which photographs to identify. Rollins selected five photographs of the people he saw at the house at the time of occurrence. O'Connor showed Rollins the array of 19 photographs five separate times, shuffling the photographs and placing them in a different order, and each time, Rollins identified the same five individuals.

Following closing argument, the circuit court noted that no direct evidence existed and, in reviewing the charges, it drew inferences that were compelled rather than directed. According to the court, there was no question from the record that petitioner was identified as the participant in the crime by someone that knew him from the neighborhood, and that Rollins was unimpeached on any major issue. The court found petitioner guilty of murder, armed violence, residential burglary and home invasion predicated on the intentional injury of the deceased.

On direct appeal, this court affirmed one of petitioner's murder convictions, reversed and vacated two other murder convictions and remanded the case to clarify the consecutive nature of the murder sentence. *See People v. Daniels*, No. 84-0997 (1984) (unpublished order under Supreme Court Rule 23).

Petitioner's subsequent petition for post-judgment and post-conviction relief relied, *inter alia*, upon a recantation by Rollins of his testimony. Petitioner sought relief from

judgment based upon: (1) newly discovered evidence that Rollins gave perjured testimony; (2) the violation of his constitutional right to effective assistance of counsel due to his attorney's failure to present the alibi testimony of his mother and sister; and (3) the State's failure to disclose to the defense that they assisted Rollins with a juvenile residential burglary charge in exchange for his testimony at petitioner's trial.

At the hearing on his petition, Monica Summerville, petitioner's sister, testified that she kept in constant contact with defense counsel, Marc Kadish, throughout the proceedings. Summerville stated that she had informed Kadish that petitioner was at home with his mother, Rose Triplett, and sister, Stephanie Adams, at the time of the murder.

On cross-examination, Summerville testified that at the time of the murder, she was a 20-year old university student living on campus, and that she did not return home for Christmas vacation. Summerville recounted that she spoke to Kadish prior to and during petitioner's trial to relay petitioner's request to have his mother and sister testify as alibi witnesses. Kadish told Summerville that he would not call petitioner's mother and sister as alibi witnesses because the circuit judge would perceive their testimony as biased. According to Summerville, Kadish spoke to Mrs. Triplett and Adams prior to and during petitioner's trial. Although Summerville was present for some conversations between Kadish, Mrs. Triplett and Adams, the record does not illustrate discussion of petitioner's alibi during these meetings.[2]

---

[2] The State filed answers to the petition for post-judgment and post-conviction relief denying each factual allegation, but agreed petitioner was entitled to an evidentiary hearing. The State did not challenge the

Adams testified that on December 24, 1981, she resided on the first floor of a two-flat apartment building with her husband, two children and petitioner. That morning, she awoke at about 9:00 or 9:30 a.m. and observed that petitioner was at home until late in the afternoon. She stated on cross-examination that she spoke to Kadish before petitioner's trial, but the record does not show that petitioner's alibi was discussed.

Mrs. Triplett testified that on December 24, 1981, she lived on the second floor of the same two-flat apartment building in which Adams resided. On the morning of the murder, she went downstairs at about 8:00 or 9:00 a.m. to give petitioner his Christmas present. Mrs. Triplett was not asked to testify at petitioner's trial. She stated on cross-examination that she spoke with Kadish once before petitioner's trial, but did not recall the substance of that conversation.

Kadish testified that he had no independent recollection of whether the State informed him that Rollins was to receive any benefit for his testimony against petitioner. Kadish stated that, based on his experience, had he been told that Rollins had received a benefit for his testimony, he would have cross-examined Rollins regarding that subject.

During the preparation of petitioner's defense, Kadish did not recall having a conversation with petitioner regarding an alibi. According to Kadish, if petitioner had raised an alibi, Kadish would have confronted petitioner with the statements of his codefendants and sought to discover evidence supporting the alibi, stating that he would have "chased it to the end of the earth."

---

timeliness of the petition and, therefore, the issue is waived for review. *See People v. Wiley*, 156 Ill. 2d 464, 468, 622 N.E.2d 766 (1993).

On cross-examination, Kadish testified that he did not believe he was informed of the alibi defense because the decision of whether to call alibi witnesses would not have been made unilaterally, rather, he first would have discussed the defense with petitioner's family. Kadish stated that petitioner would have been responsible for the ultimate decision of whether to call alibi witnesses.

Rollins testified that on December 24, 1981, he was delivering newspapers with Reml on 54th Place when he observed five individuals standing outside a house. Rollins stated that petitioner was not among the group of boys that perpetrated the crime. He claimed that he had never seen petitioner before the incident.

According to Rollins, the police interviewed him five time after the murder, during which they continually pressured him to identify petitioner as one of the perpetrators. First, the police interviewed Rollins at his home, in the presence of his stepfather and mother, wherein he told them what he had witnessed, which did not include an identification of petitioner. The police picked up Rollins on his way home from school to interview him again and brought him to a tavern at 51st and Wood Streets to view a photograph array. There, he selected four photographs, but none of the petitioner. Rollins stated that he saw petitioner's photograph among those in the array. The police showed petitioner's photograph to Rollins, but he did not recognize petitioner. Rollins testified that the police took him to a "White area" near 47th Street and Lowe Avenue for the third interview. Again, Rollins selected photographs of the four individuals that he had identified previously. During the interview, the police informed Rollins that codefendants Haymore and Miller had told them that petitioner also was at the crime scene. Rollins stated that police took him once more to the tavern at 51st and Wood Streets, and, for the fifth

interview, brought him to the police station at 39th Place and California Avenue, where he selected the same four photographs. Rollins explained that the police interviewed him away from home because his mother and stepfather did not consent. After being told that "rappies," the codefendants, placed petitioner at the crime scene and at the request of the officers, Rollins agreed to identify petitioner as one of the individuals at the crime scene.

Rollins testified that the police offered him a ride to the courthouse to prepare for trial. When Rollins met with the ASA, the police showed him six photographs, of which, he could name only four suspects, but not petitioner. The ASA gave Rollins a card and told him to call if he ever got into trouble.

Prior to trial, Rollins was arrested for committing a residential burglary in which he stole firearms from a house. Either his mother or stepfather contacted the ASA. During trial preparation, he notified one of the ASAs about his arrest, but the ASA told him not to worry, "we already know," and that he "took care of it."

Rollins claimed that he lied at trial when he identified petitioner as one of the individuals he observed at the crime scene. Subsequent to petitioner's trial, Rollins received one year of supervised probation for his residential burglary charge. Rollins was convicted of first degree murder in 1989, sentenced to 22 years in prison and paroled in 1999. He testified that he was telling the truth at petitioner's hearing.

On cross-examination, Rollins recanted all testimony from petitioner's trial regarding the order of events and details that he observed on December 24, 1981. Rollins stated that he did not see anyone enter Knight's home that morning. At petitioner's trial, he relayed all the information

the police gave him during trial preparation. Rollins did not remember the name of the ASA who gave him a card.

When serving his prison sentence, Rollins received a letter and affidavit from petitioner's attorney regarding an appeal. Rollins met with an ASA prior to testifying at petitioner's hearing, during which the ASA allegedly told him, "I know you're lying, this better not be no GD bull shit [*sic*]," referring to the Gangster Disciples. In response to the question of whether Rollins was offered a benefit to testify against petitioner at trial, Rollins stated, "[t]here were words put like that."

The State asked Rollins if he was a member of a street gang, to which defense counsel objected based on relevance. The circuit court overruled the objection because the question could elicit testimony showing interest, bias or prejudice. Rollins stated that he was a member of the Gangster Disciples before he served his prison sentence.

Reml submitted an affidavit in which he stated that he and Rollins did not stop by Knight's home on the morning of December 24, 1981, but continued walking to deliver newspapers.

O'Connor, who retired from the Chicago Police Department in 1998, testified that he and his partner, Detective Higgins, interviewed Rollins only once at a "snack shop," but was unsure of the exact date, stating that the interview occurred between the 20th and 25th of January 1982. Two days after the murder, O'Connor obtained Reml's address from his employer and learned that Reml had moved to Seattle. O'Connor located Reml with the help of the Seattle Police Department because he was "hiding out somewhere." Reml and Raymundo Cesnaros, another newspaper delivery boy, provided O'Connor and Higgins with Rollins' name and address.

According to O'Connor, during the interview, Rollins consistently selected the same five photographs of the individuals outside Knight's home on December 24, 1981. O'Connor did not tell Rollins that he could identify petitioner's photograph as one of the persons involved in the crime because his codefendants implicated him. At the time of the interview, the police had not yet arrested the codefendants. O'Connor testified that Rollins identified petitioner's photograph five times. Rollins told O'Connor that petitioner was directing the others during the commission of the crime, had forced open the door to Knight's home and was the last one to exit, closing the door behind him. O'Connor did not see Rollins again after the interview, had no contact with him before petitioner's trial and was unaware that he had been arrested for committing a residential burglary prior to trial.

On cross-examination, O'Connor testified that the police report which included Rollins' interview did not list a date. Specific dates for other interviews from petitioner's case were included in additional reports. In January 1982, the codefendants were brought to the police station, had their photographs taken and were released. O'Connor waited between 10 to 15 days to interview Rollins after learning that he knew one of the subjects involved in the crime. O'Connor stated that it was proper police procedure to pick up a child walking home from school without obtaining parental consent in order to conduct an interview. Although Rollins repeatedly identified five of the perpetrators, O'Connor did not arrest petitioner and the codefendants until one year later, explaining that "we tried to build a case, somewhat, we had had other jobs, other assignments, [the case] laid dormant for pretty much a year, all we had was a young man's identification, which was good, but, we wanted to improve the case if possible."

Higgins testified that the codefendants did not give any statements inculpating themselves and petitioner for Knight's murder before their arrest, but made incriminating statements against one another after they were taken into custody.

Cook County State's Attorney investigator John Regan testified that he was present for a July 27, 2000 conversation between Rollins and ASA Thomas Gainer. Rollins explained that during his initial interview with the detectives, they shuffled the 19 photographs, put them down, picked out five photographs and repeated the process. After shuffling the photographs a third time, Rollins selected the same five photographs that the detectives previously chose.

In a December 21, 2000 "heated" conversation, Rollins discussed his juvenile residential burglary charge in the presence of Regan, Gainer and ASA William Carroll. Rollins had spoken with a defense attorney who questioned whether he testified against petitioner in return for an ASA's help after his arrest. According to Regan, Rollins answered the defense attorney, "if that's how she wanted to construe my reply, that's fine." Rollins also discussed the Gangster Disciples.

On cross-examination, Regan stated that Rollins' mother told him that she had spoken to a man who took Rollins to and from the courthouse during his juvenile case. The man told Rollins' mother that if Rollins got into trouble again, he would not be able to help him. Rollins' mother also stated, however, that neither she nor her husband ever spoke to an ASA to help Rollins after he was arrested.

Former Cook County ASA James Linn testified that he was assigned to prosecute petitioner and his codefendants in 1983. Prior to petitioner's trial, Linn met with Rollins several times, during which Rollins never told Linn that he did not see petitioner at the crime scene. Rollins did not tell Linn that the only reason he identified a picture of petitioner

was because the detectives instructed him to do so. Rollins also did not inform Linn that the detectives told him to select petitioner's photograph because the codefendants implicated petitioner in the crime. Linn stated that neither Rollins nor any members of his family contacted him regarding Rollins' residential burglary arrest.

Linn testified on cross-examination that he did not run a criminal history check on Rollins prior to the codefendants' jury trial in October 1983. He stated that he "may have" given one of his cards to Rollins during trial preparation, but did not recall doing so.

Cook County ASA Thomas Epach testified that he prosecuted the codefendants with Linn. Epach stated that, in 1983, it was routine procedure for ASAs to conduct criminal history checks on their own witnesses prior to trial, but not on juveniles because their records were kept confidential. At best, an ASA could ask police for a summary sheet from the youth division, but would not always be able to receive a report.

Cook County ASA Kenneth McCurry testified that he prosecuted petitioner with Linn in 1984. Rollins did not tell McCurry that he was unable to identify petitioner as a perpetrator of the crime. Neither Rollins nor members of his family told McCurry that he had been arrested and charged with residential burglary. Prior to trial, McCurry was unaware of Rollins' arrest.

Following the hearing, the circuit court denied petitioner post-judgment and post-conviction relief. The court found that petitioner's allegation of perjured testimony lacked merit because Rollins had no motive to select petitioner's photograph. The court also found Rollins' recantation testimony to be incredible and impossible. Regarding petitioner's allegation of ineffective assistance of trial counsel, the court noted that "[t]he alibi testified to in this

hearing is not in conflict with the testimony of the witness Rollins at trial in that the alibi time doesn't exclude the possibility of Rollins being a witness to the offense with the defendant involved and the defendant returning to his residence shortly thereafter," and, therefore, "it really was not an alibi." The court stated that it had no doubt that defense counsel Kadish would have followed up the alibi if it was appropriate and that Kadish represented petitioner vigorously and diligently. Finally, the court found that a violation pursuant to *Brady* did not occur since no reward was given to Rollins for his testimony against petitioner. The court noted that both Rollins and Reml received the same sentence for the residential burglary disposition. Petitioner timely appeals.

The Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2000) (Act)) permits a petitioner to mount a collateral attack against his conviction and sentence based on violations of his constitutional rights. *People v. Coleman*, 168 Ill. 2d 509, 522, 660 N.E.2d 919 (1995). The Act involves a three-step process for adjudicating petitions for post-conviction relief. *People v. Prier*, 245 Ill. App. 3d 1037, 1039, 613 NE.2d 1226 (1993). *Prier*). To withstand dismissal at the first stage of post-conviction proceedings, a *pro se* petition need only contain a simple statement that presents the gist of a claim for relief which is meritorious when considered in view of the trial record. *Prier*, 245 Ill. App. 3d at 1039. The Act requires that the allegations in the petition for post-conviction relief be supported by affidavit, the record or other evidence. 725 ILCS 5/122-2 (West 2000). If the petition is not dismissed as frivolous or patently without merit, counsel may be appointed to represent an indigent petitioner, and said counsel will be afforded an opportunity to amend the petition. *Prier*, 245 Ill. App. 3d at 1039. At that point, the State may move to dismiss or answer the petition. *Prier*, 245 Ill. App. 3d at 1039. If a substantial

showing of a constitutional violation is set forth, the petition advances to the third stage for an evidentiary hearing. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102 (1996). Relief at the third stage of the post-conviction process is justified only where a petitioner demonstrates by a preponderance of the evidence that his conviction or sentence resulted from a substantial deprivation of federal or state constitutional rights. *People v. Montgomery*, 192 Ill. 2d 642, 654, 736 N.E.2d 1025 (2000) (*Montgomery*). The dismissal of a post-conviction petition following an evidentiary hearing will not be disturbed on appeal unless manifestly erroneous. *Montgomery*, 192 Ill. 2d at 654.

I

Petitioner initially asserts that he was denied his constitutional right to a fair trial and due process of law, claiming that State knowingly used perjured testimony at trial.

A

Petitioner contends that the circuit court's denial of post-judgment and post-conviction relief was manifestly erroneous given the extraordinary and unusual circumstances of Rollins' recantation, since his was the only evidence linking petitioner to the crime and the recantation was not made under suspicious circumstances. Petitioner also points out that Rollins testified at trial when he was an "impressionable twelve year-old child," and that the undisputed facts corroborate the recantation testimony and discredit the detectives' post-conviction testimony.

The State responds that the circuit court's decision was not manifestly erroneous because Rollins' recantation was not newly discovered evidence and Rollins' credibility was

destroyed completely in light of the fact that the police were unaware of the codefendants' culpability until after their arrest one year after his interview.

Perjured testimony may form the basis for a new trial if raised in a motion for post-judgment relief under section 2-1401. *People v. Brown*, 169 Ill. 2d 94, 107-08, 660 N.E.22d 964 (1995). A new trial based on newly discovered evidence is warranted if it is (1) of such conclusive character that it will probably change the result on retrial and (2) material to the issue and not merely cumulative. *People v. Albanese*, 125 Ill. 2d 100, 111, 531 N.E.2d 17 (1988) (*Albanese*). In addition, the evidence "must have been discovered since the trial and be of such character that it could not have been discovered prior to trial by the exercise of due diligence." *Albanese*, 125 Ill. 2d at 111. Similarly, in a post-judgment motion for a new trial based on alleged perjury, petitioner must show, by clear and convincing proof, the substance of his allegations. *People v. Burrows*, 172 Ill. 2d 169, 180, 665 N.E.2d 1319 (1996) (*Burrows*). Generally, recantation testimony of witnesses often is deemed highly unreliable and is not regarded as sufficient grounds for a new trial. *Burrows*, 172 Ill. 2d at 188; *People v. Dotson*, 163 Ill. App. 3d 419, 422, 516 N.E.2d 718 (1987).

Here, petitioner alleges that Rollins' recantation testimony is newly discovered evidence demonstrating that Chicago police detectives forced him to testify falsely at trial to identify petitioner as a perpetrator in the crime. Petitioner relies upon several cases (*People v. Jimerson*, 166 Ill. 2d 211, 228, 652 N.E.2d 278 (1995) (*Jimerson*); *Burrows*, 172 Ill. 2d at 191) to support his allegations.

Similar to *Burrows*, petitioner could not have discovered Rollins' alleged fabricated testimony prior to trial, on direct appeal or by the exercise of due diligence. Unlike *Jimerson*, however, petitioner has not provided and the record does not

show evidence supporting the existence of an agreement between either the detectives or ASAs and Rollins to testify against petitioner in exchange for a benefit. In addition, petitioner has not demonstrated that Rollins' recantation testimony corroborates the evidence at trial or the testimony of other trial witnesses.

Petitioner claims that the detectives' testimony was "unreasonable and improbable," calling into question the length of time detectives waited to interview Rollins and arrest the suspects, and discrepancies in testimony such as whether petitioner entered Knight's home during the commission of the crime. Other than pointing out that the detectives waited to interview Rollins and arrest the suspects, petitioner has neither provided any legal authority nor shown why these gaps of time significantly damage the State's case. Further, the circumstance that another witness at petitioner's trial gave testimony inconsistent with Rollins' account does not render that testimony incredible. *See Burrows*, 172 Ill. 2d at 185. Although some discrepancies in testimony exist, they do not rise to the level of implausibility such that a new trial is warranted.

Petitioner, citing *People v. Brooks*, 187 Ill. 2d 91, 133, 718 N.E.2d 88 (1999) (*Brooks*), avers that Rollins' recantation was made absent suspicious circumstances or spurious motives. Viewing the evidence in the light most favorable to the State (*People v. Morrow*, 303 Ill. App. 3d 675, 708 N.E.2d 430 (1999)), however, the trier of fact reasonably could have believed that Rollins' identification of petitioner and description of the events on December 24, 1981 were truthful and that his subsequent recantation was untruthful. Petitioner has not given any persuasive reason to substitute the reviewing court's judgment for that of the circuit court on this matter.

Petitioner insists that, although Rollins was competent to testify as a 12-year-old child, he was more susceptible to police pressure and coercion. The trier of fact determines the credibility of the witnesses and the weight to be given their testimony. *People v. Weninger*, 243 Ill. App. 3d 719, 725, 611 N.E.2d 77 (1993). The record indicates that Rollins' description of the events at trial and numerous identifications of petitioner were made freely, voluntarily and without compulsion or inducement of any sort. The circuit court was free to credit and accept as true the accounts of Rollins' testimony. Viewing all the evidence in the light most favorable to the State, petitioner has not shown sufficient evidence of police pressure and coercion for Rollins to testify.

B

Petitioner argues that the circuit court failed to consider certain evidence in finding that Rollins' recantation was incredible, including the detectives' motives for allegedly coercing Rollins, the fact that it was not impossible for Rollins' interviews with the detectives to have occurred as Rollins testified and consideration of Reml's affidavit.

Petitioner did not provide case law in support of his contention in contravention of Supreme Court Rule 341(e)(7). 177 Ill. 2d R. 341(e)(7). Bare contentions without argument or citation of authority do not merit consideration on appeal. *See Fuller v. Justice*, 117 Ill. App. 3d 933, 942-43, 453 N.E.2d 1133 (1983). Therefore, this argument is waived. *See Nancy's Home of the Stuffed Pizza, Inc. v. Cirrincione*, 144 Ill. App. 3d 934, 939, 494 N.E.2d 795 (1986).

II

Petitioner next asserts that the circuit court erred by allowing testimony of Rollins' gang affiliation since there

was no evidence that petitioner belonged to a gang. Petitioner argues that this testimony was irrelevant, prejudicial and served only to cast Rollins in a scurrilous light.

The State contends that the circuit court did not abuse its discretion because the disputed testimony was relevant to expose any bias or motive that Rollins may have had in recanting his trial testimony.

The admission of evidence is within the circuit court's sound discretion and its ruling will not be disturbed by a reviewing court absent an abuse of that discretion. *People v. Ward*, 101 Ill. 2d 433, 455-56, 463 N.E.2d 696 (1984).

The right to cross-examine a witness as to his biases, prejudices or ulterior motives is protected by both the Federal and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The United States Supreme Court in *Davis v. Alaska*, 415 U.S. 308, 316-17, 39 L. Ed. 2d 347, 354, 94 S. Ct. 1105, 1110 (1974) stated that "[t]he partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' [Citation.] *** [T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." The Illinois Supreme Court has held that on cross-examination, a defendant should be given the widest latitude when trying to establish a witness' bias or motive. *People v. Wilkerson*, 87 Ill. 2d 151, 156, 429 N.E.2d 526 (1981).

Rollins himself first raised the subject of gangs during his cross-examination, claiming that an ASA who previously interviewed him stated that the recantation "better not be no GD bull shit." The State did not initiate the line of questioning regarding Rollins' gang affiliation. Nevertheless, petitioner cannot claim here that Rollins' gang

affiliation was irrelevant for the purposes of establishing possible bias, motive or prejudice. The circuit court did not abuse its discretion by allowing the State to elicit testimony of Rollins' gang membership.

III

Petitioner next contends that he was denied his constitutional right to effective assistance of trial counsel because of counsel's failure to call two alibi witnesses.

The State responds that this issue should be waived from determination since it could have been raised on direct appeal.

The supreme court in *People v. Ruiz*, 132 Ill. 2d 1, 9, 547 N.E.2d 170 (1989) held that "[r]ulings on issues that were previously raised at trial and on direct appeal are res judicata, and *issues that could have been raised* in the original proceedings, but were not, will be deemed waived." (Emphasis added.)

On direct appeal, this court reviewed defendant's ineffective assistant of trial counsel claims, including the failure to: (1) comply with discovery rules; (2) impeach the State's only eyewitness; and (3) object to an improper amendment to the indictment. This court considered each of petitioner's assertions of error, reversing a conviction based upon the amended indictment, finding that petitioner did not demonstrate prejudice from failure to comply with discovery rules and ruling that counsel effectively impeached Rollins. *See People v. Daniels*, No. 84-0997 (1985) (unpublished order under Supreme Court Rule 23).

Although petitioner's current ineffectiveness claim varies from those on direct appeal, it does so only in that it points out an additional factor that could have been raised on direct appeal. *See People v. Emerson*, 153 Ill. 2d 100, 106, 606 N.E.2d 1123 (1992) (*Emerson*). The Act "'was not intended

to be used as a device to obtain another hearing upon a claim of denial of constitutional rights where there has already been a full review of the issues raised.'" *Emerson*, 153 Ill. 2d at 106, quoting *People v. Cox*, 34 Ill. 2d 66, 67-68, 213 N.E.2d 524 (1966).

Because this court previously addressed petitioner's ineffective assistance of counsel claims on direct review, the subsequent addition of a different allegation of incompetence does not allow the relitigation of this issue in his motions for post-judgment and post-conviction relief. *See Emerson*, 153 Ill. 2d at 107; *Albanese*, 125 Ill. 2d at 105. Further, none of the exceptions to the doctrine of *res judicata* are applicable here.

Accordingly, because petitioner did not present any claim which was not barred by the doctrine of *res judicata* or waiver, the circuit court did not err by dismissing petitioner's petition.[3]

IV

Petitioner next claims a *Brady* violation occurred because the State failed to disclose representations to Rollins that it would provide him with assistance in his juvenile case. According to petitioner, even if Rollins did not benefit from testifying against petitioner by receiving a more lenient

---

[3] Waiver aside, petitioner's claim of ineffective assistance of trial counsel for failure to call two alibi witnesses lacks merit because petitioner has not established the existence of an alibi. Alibi, which means "elsewhere" in Latin, is "[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." Black's Law Dictionary 72 (7th ed. 1999). The two claimed alibi witnesses, Mrs. Triplett and Adams, cannot account for petitioner's whereabouts during the relevant time period. Further, petitioner's speculation as to the exact time Rollins witnessed the events is unsupported by the record.

disposition for his residential burglary charge, the State, nonetheless, provided Rollins with a motive to testify falsely.

The State responds that the evidence at the post-conviction hearing proved that the trial prosecutors were unaware of Rollins' juvenile residential burglary charge prior to petitioner's trial and that Rollins was given no consideration in his guilty plea to that charge.

In *Brady*, the United States Supreme Court established the government's affirmative duty to disclose evidence that is favorable to defendant. Where evidence is material either to guilt or punishment, regardless of the good faith or bad faith of the prosecution, the suppression of such evidence favorable to an accused upon request violates due process. *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218, 83 S. Ct. at 1196-97. In making its materiality determination, a court should consider the cumulative effect of all suppressed evidence favorable to the defense, rather than consider each piece individually. *People v. Hobley*, 182 Ill. 2d 404, 433, 696 N.E.2d 313 (1998). Although the circuit court's judgment is given great weight, a reviewing court will find an abuse of discretion when a defendant is prejudiced by the discovery violation and the circuit court fails to eliminate the prejudice. *People v. Matthews*, 229 Ill. App. 3d 914, 918, 702 N.E.2d 291 (1998), citing *People v. Weaver*, 92 Ill. 2d 545, 559, 442 N.E.2d 255 (1982).

The *Brady* rule has been codified in Illinois by Supreme Court Rule 412(c) (134 Ill. 2d R 412(c)), which requires the State to "disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged." Information that may cast doubt on the credibility of a State witness tends to negate the guilt of the accused and must be disclosed. *People v. Sharrod*, 271 Ill. App. 3d 684, 688, 648 N.E.2d 1141 (1995) (*Sharrod*).

Petitioner has the burden of establishing a *Brady* violation and must demonstrate that the information was material and favorable. *People v. Goldsmith*, 259 Ill. App. 3d 878, 888, 630 N.E.2d 1259 (1994). Evidence is considered material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability" is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494, 105 S. Ct. 3375, 3383 (1985).

The State must disclose evidence with potential impeachment value such as prior convictions, probationary status, pending criminal charges and juvenile adjudications. *Sharrod*, 271 Ill. App. 3d at 688. Noncompliance with this obligation is excused only where the prosecution did not know and, through the exercise of due diligence, could not have become aware of the matter in question. *People v. Redmond*, 146 Ill. App. 3d 259, 263, 496 N.E.2d 1041 (1986).

The evidence supporting petitioner's argument includes Rollins' recantation testimony in which he received a card from an ASA and was told not to worry about his residential burglary charge. Further, Investigator Regan testified that he spoke with Rollins' mother, who recounted that a man had told her that if Rollins ever got into trouble again, he would be unable to help him.

The record is clear, however, that no ASA assigned to the case was aware of Rollins' pending residential burglary trial charge prior to or during petitioner's trial. The post-conviction court noted the inability of the ASAs to discover that Rollins had a pending charge due to confidential juvenile records. Further, neither Rollins nor his mother told the ASA about the pending residential burglary charge prior to

petitioner's trial and neither could name the ASA who allegedly aided him during his juvenile case.

Although petitioner's conviction rested primarily on Rollins' identification testimony, he has not shown that if Rollins' pending juvenile charge had been disclosed to the defense, the result of the proceeding would have been different. The record demonstrates that the circuit court heard sufficient evidence during the post-conviction hearing to resolve the issues of the State's diligence or nondiligence and the possibility of prejudice to petitioner. No abuse of discretion was shown.

V

Petitioner next argues that he is entitled to a new trial based on the cumulative effect of newly discovered evidence presented at his post-conviction hearing.

Because each of petitioner's assignments of error were rejected, this issue need not be addressed. *See People v. Thermond,* 317 Ill. App. 3d 1133, 1146, 741 N.E.2d 291 (2000).

Accordingly, the decision of the circuit court of Cook County to deny petitioner's post-judgment and post-conviction petition is affirmed.

AFFIRMED.

Appendix E

Circuit Court of Cook County, Illinois, Criminal Division

PEOPLE OF THE STATE OF ILLINOIS

v.

BRIAN TRIPLETT a/k/a BRIAN DANIELS

Case No. 83 C 4356

RULING ON POST-CONVICTION PETITION

Reporter's Official Transcript of proceedings

March 26, 2001

Before Honorable Michael B. Bolan

****

Page 27

****

THE COURT: The Court has heard the evidence and considered the arguments raised in the Petition, the relevant authority cited by counsel, and will make the following findings of fact and rulings of law.

The representation that Mr. Triplett has received here is nothing short of excellent and diligent and skillful. And I wish to commend the attorneys from your firm, Jenner & Block, for continuing in their long tradition of skillful and artful representation of the highest quality in our profession. It's a privilege to practice law. You're one of the few firms that you can count on to help those who could not afford the

privilege of good representation. You have had a great tradition of that and this is typical of that.

There are three basic allegations that appear here, three bases for relief under the Post-Conviction Act. And Section 122. There is also on allegation that relates to relief under 1401, which is perjured testimony. Perjured testimony grants you relief under 1401 as well as the Post-Conviction Hearing Act. It would be wrong if a person were to be in custody or convicted of a crime on the basis of perjured testimony. That denies a person of due process of law, it's fundamentally unfair, and the conviction cannot stand and should be reversed outright.

The allegation of Petitioner's testimony adduced at the hearing, in particular relating to the subject of perjured testimony, comes from the witness, a single witness, Castin Rollins. And Castin Rollins is apparently the sole eyewitness to the case, the sole eyewitness who testified to the case. He has had a bumpy road since his tenth birthday, when he was aged 10 when this occurred, in helping another lad named Reml going on a newspaper route, or newspaper assistant to a residential burglar looking for guns to murder. So his testimony in 1984 convicts this defendant of murder and in 2001 is seeking to alleviate the conviction of the same person. He says don't believe him then, but believe him now after his murder conviction. This is the analogous aspect. When you are an innocent babe in the woods you have no credibility, but when you're a convicted murderer, you are asking me to be persuaded that is when you really should believe him because it's bad in jail. That is kind of a bad posture to take in terms of credibility.

His testimony is quite interesting. When he is ten years old in January 1982, about a month -- within a month of this murder on Christmas Eve, he says in court here today that police officers had a conversation. They snatched him off

the street and took him to this restaurant, restaurant-bar over in an area about a mile or two from his house, but it was in a neighborhood where the racial makeup of the neighborhood is different. He is a young man of African American ancestry and this was a predominantly white neighborhood. And the inference that the Petitioner wants you to find is that it is coercive. And the prosecution or the Respondent wants you to find it makes it free from the influences where he might be afraid to be interviewed in sight of other kids in the neighborhood because he was one of the guys who did the murder. Joe-Joe says he went up to one of the shorties, a gang term by the GDs and he knows that the GDs are, one of shorties and says don't say you saw me here. So varying inferences could be drawn from the same amount of evidence. His opinion is that he got some good treatment there. I don't think it's because as the policemen say, they had a big table so they could spread out the pictures. They got big tables in the police station, too, or perhaps, in the person's home.

Unequivocally, he comes in here in 2001 and says I was shown the photo array consisting of a large number of photos. He says between 10 and 30. Police officers say 19. In any event, it is at this time that is crucial to this case. He says at this time he was shown certain photos, and at this time in 1982, January, he puts the date on it himself, he picks out four of them and specifically says in his testimony here that he did not and never did pick out the picture of the defendant Brian Triplett. The officer's testimony in reply to that is that he picked up five times after he was shuffling the photos numerous times various offenders, including the picture of the defendant Brian Triplet. I am sure this picking process took place in 1982, in January.

I attribute it today, his testimony and affidavit, we are talking about Rollins again, that this is a product of coercion

by the police and suggestion by the police to a person of a young mind, a person of ten years old, when they said pick out the defendant's picture because the other fellows said he did this.

There is no motive why or forwarded why anybody would want to pick out Brian Triplett at this time, 1982. Why would the police want anybody to identify Brian Triplett? That is one part. Two, there are no rappies until 1982 until they are later arrested. Obviously, this case laid fallow for a year and then policemen brought in the persons who were identified. The only witness we have is Rollins and perhaps this Reml, this kid who was also there. Maybe that was another source of information. In any event, there were no rappies at the time the identification was made and therefore, the Court finds that Mr. Rollins is incredible in his statements here in court, that the identification process was the product of coercion and suggestion. The Court finds it impossible for that to have occurred as he said it occurred. So that allegation of perjured testimony has no merit.

The other matters are also of concern to the Court. One relates to the Brady violation, failure to disclose the now witness Rollins who is aged 13 in 1984, becomes involved in a residential burglary, along with his paper route pal, same guy Frank Reml. They were together and they burglarized this place. He says that he had requested his mother or stepfather to call the State's Attorney who was the prosecutor in the murder case where the defendant Brian Triplett was a codefendant and asked for help. And there was suggestion of help to him at the time. The parent said that they never called the State's Attorney. Okay. But there was no request. The three State's Attorneys who were involved in the prosecution, Judge James Linn, Tom Epach, and Ken McCurry all said that they were never requested to act on behalf of a witness who would testify for them, who actually

had previously testified for them in the jury trial the preceding October, where four other codefendants, not this defendant, were tried.

I also note, kind of an independent showing here, that there were no rewards given to Rollins by the transcript of the juvenile proceedings. Both he, Rollins, and Reml got the same sentence, which was a big old supervision where the judge said, "Shame for shame, you're going to have to stay and study or so you can pass everything." That's what she says not to Rollins, but to the other guy. "Get your grades up. If you concentrate on your studies, you see, you wouldn't have time to get in this kind of trouble." So there was a different attitude in juvenile court than there is in criminal courts. I haven't said that in a long time. In any event, I find there were no rewards given.

Nowadays the prosecution gets all the arrest sheets on witnesses, including the juvenile sheets. They didn't at that time. And this is why we probably have some revisions on procedure of criminal cases concerning discovery at this time, particularly in murder cases. In civil practice you have a final pretrial conference and everything is brought up to date. You check everything and see if there is later discovered evidence. Perhaps, if that procedure were followed, they would have found something concerning Rollins having a case pending at the time. He already testified before it was not the practice at that time to obtain juvenile sheets and there was no reason to suspect that he had a juvenile case. And so I find no violation under the holding of Brady versus Maryland.

The third allegation seeking relief under the Post-Conviction Act is incompetence of counsel, failure to assert the alibi defense. You apply the test of Strickland versus Washington to the result of the -- This is a one witness case. Indeed, if there was a strong alibi or something like that, it

would have important weight in the defense of this case. The alibi testified to in this hearing is not in conflict with the testimony of the witness Rollins at trial in that the alibi time doesn't exclude the possibility of Rollins being a witness to the offense with the defendant involved and the defendant returning to his residence shortly thereafter. And so I don't say in fact there is no alibi. To resolve conversations that took place some 20 some odd years ago is always difficult. One witness, who's a lawyer, says I for sure said to Attorney Mark Kadish there was an alibi. Here we have Mark Kadish saying I have no specific recollection of that, and an attorney saying if there had been, I would have discussed it with my client, made an investigation, and let him made a decision. Mark Kadish is no ordinary attorney. He is an exceptional, good, diligent attorney, legal scholar, legal professor, who runs the pro bono program of a major law firm here in Chicago, that also has an impeccable reputation. I have no doubt that he would have followed it up, if it were appropriate, if there were indeed an alibi. If it were a statement that is not an alibi but just does not show an actual conflict between the testimony we hear 20 years later and the actual testimony at trial concerning the time of the offense and the defendant's presence there, no wonder he wouldn't assert it, because there would be no merit to it. That is before we even have to get to the issue of credibility. I have no question in my mind that the defendant's sister would certainly liked to have helped the defendant. She is a young lady, a lawyer prominence. The other thing, Mark Kadish, he represented the defendant in several cases, so he was familiar with the defendant and in vigorously representing him. I find him to a diligent lawyer and there was no lack of diligence on his part and he did not fail by any standard to show the competence required of a lawyer representing a defendant with this type of case. And furthermore, it was not outcome determinative because it really was not an alibi.

For those reasons the petition is denied. A copy of the order of the court shall be furnished to the defendant within 10 days.

And if you wish to have post-trial motions, motion to reconsider, file those within 30 days. Otherwise, if you are going to file an appeal from the rulings of the Court, you have 30 days to do that.

Because you're an indigent person, counsel will be appointed and a transcript furnished to you.

Are there any other matters to take up before the court?

MR. STRATTON: No, Your Honor.

MR. GAINER: No, sir.

THE COURT: Return to IDOC.

(Which were all the proceedings had in the above-entitled cause on this date.)

Appendix F

State Of Illinois Court Of Appeals, First District

PEOPLE OF THE STATE OF ILLINOIS

v.

BRIAN DANIELS a/k/a BRIAN TRIPLETT

84-0997

October 3, 1985

Before McMorrow, J., Jiganti, P.J., and Johnson, J.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Defendant was charged by a 16-count indictment with five counts of murder (Ill. Rev. Stat. 1983, ch. 38, pars. 9-1(a)(1), 9-1(a)(2), 9-1(a)(3)), two counts of home invasion (Ill. Rev. Stat. 1983, ch. 38, pars. 12-11(a)(1), 12-11(a)(2)), residential burglary (Ill. Rev. Stat. 1983, ch. 38, par. 19-3), armed robbery (Ill. Rev. Stat. 1983, ch. 38, par. 33A-2). Although the record is confusing as to what convictions were entered, following a bench trial defendant was found guilty of murder, home invasion and burglary. He was sentenced to serve concurrent terms of 30 years for murder and 25 years for home invasion. These sentences, however, were to be served consecutive to "any sentences you receive in other cases."

On appeal, defendant raises six issues: (1) whether the trial court erred in granting the State leave to amend the indictment in such a manner as to change the offense charged; (2) whether his felony-murder conviction based on

residential burglary must be vacated; (3) whether he was denied his constitutional rights to effective legal representation due to the failure of his lawyer to comply with the discovery rules, impeach the State's only eyewitnesses, and object to improper amendment to the indictment; (4) whether the State failed to prove him guilty beyond a reasonable doubt; (5) whether his conviction for burglary must be reversed where the trial court specifically found that the State had failed to prove beyond a reasonable doubt the intent alleged in the indictment; and (6) whether the mittimus should be amended to delete the language that the sentences are to be consecutive to those of any other cases because this language fails to clearly define the limits of the sentence imposed.

Prior to trial, the State moved to amend count 8, which alleged residential burglary, by deleting the word "residential," so that the charge would be burglary. The State explained that there was no offense of residential burglary at the time the incident occurred. Defendant offered no objection to that amendment. The State then *nolle prossed* all the armed violence counts and further indicated that count 4, which alleged murder during the course of a residential burglary, should be amended by deleting the word "residential" and making it burglary under the appropriate statutory section. Defendant raised no objection.

Laverne Hansen, the deceased's daughter, then testified that on December 24, 1981, her 72 year-old father was living along at 2114 West 54th Place in Chicago. When she spoke with her father on December 23, 1981, he was alive and well, but the next day she saw him lying dead on the floor of his home. His television set was missing from the kitchen, the back pocket of his pants was torn and his wallet was missing. The parties stipulated that deceased died as a result of two stab wounds.

Detective David Kristovic testified that deceased's single-family home was immediately adjacent to an alley. The home had a front door and two doors on the east side of the building, one of which led into the kitchen. Inside deceased's kitchen on December 24, 1981, the witness found an overturned chair, a cabinet moved away from the wall and an empty television stand. Deceased's body had two stab wounds, red marks and bruises. The telephone was inoperable because the cord had been cut from outside.

Detective Thomas O'Connor testified that he had interviewed Caston Rollins and showed Rollins 19 photographs from which he selected five as pictures of people he had seen on the street near the deceased's home at the time of the incident.

Twelve-year-old Caston Rollins testified that on December 24, 1981, at 7 a.m., he was helping Frank Reml with his paper route. It was light outside at that time. The witness and Frank Reml were delivering papers on opposite sides of the street. When the witness reached Hoyne Avenue and 54th Place, he saw six youths trying to get into deceased's house approximately 100 feet away. The witness identified defendant, whom he had previously seen around the neighborhood. According to the witness, defendant told two of the youths to try to get inside the front door, and defendant told another boy, whom the witness knew as Jo-Jo, to go to the back of the house. When Jo-Jo, who had a pair of wire cutters, returned from the back of the house, he told defendant that the wires were cut. After one of the youths used a crowbar on the door, four of them went inside the house while the other two stayed outside; one remained in the alley and the other in the front of the house. The witness identified photographs of David Hartsfield, Floyd Miller, Ernest Simon and Jo-Jo Haymore as the four youths who entered to house. He further stated that although he was

standing closest to the youth who was functioning as the lookout in front of the house, he could see that defendant was the lookout at the back of the house. When the youths exited the house after approximately 10 minutes, the two lookouts ran down the alley while the other four ran toward the witness. Jo-Jo, who was carrying a television set which he did not have before he entered the house, told the witness not to tell police where he obtained the set. The witness further testified that he subsequently spoke to police and identified photographs of five of the individuals he had seen.

During cross-examination of Caston Rollins concerning an interview he had given to codefendant's counsel and a student investigator for the defense, defendant requested a recess. Defense counsel then informed the court that although he had tendered to the State a tape recording of this interview and a transcript of the tape, it was obvious that the tape recorder had been turned on and off. The law student, who had represented defendant at the interview, had taken notes and remembered Rollins saying something which was not on the tape transcript and which would impeach his direct testimony on an important point. Defendant's counsel stated that he would like to have the law student testify to perfect the impeachment if Rollins denied making the statement. The State objected that this was a breach of witness exclusion and a breach of discovery. The trial court stated that the sanction of excluding all reference to matters contained in the notes might be inappropriate because this was a case of circumstantial evidence hinging on the testimony of this witness; the court then ruled that the appropriate sanction was to interrupt cross-examination to give the State an opportunity to examine the notes and speak to its witness, and the court would consider allowing the State to reopen its direct examination prior to letting the defense continue its cross-examination. The court noted that defense counsel was

representing defendant not only as an attorney but as part of a law school-based trial advocacy program.

After a recess, defense counsel resumed cross-examination of Rollins. The witness then admitted telling Officer O'Connor that David Hartsfield was at the back of the house. Rollins further testified that he told the officer that Hartsfield and defendant switched places when the youths entered the house so that the defendant remained outside.

Twelve-year old Frank Reml then testified that on December 24, 1981, he was on his paper route with Caston Rollins. Rollins delivered papers on Hoyne toward 54th Place while the witness when to Garfield Boulevard. When the witness rejoined Rollins by 54th Place on Hoyne Avenue, he saw six youths running together from 54th Place to Hoyne. One of the boys was carrying a television set and said something to Rollins.

Detective O'Connor then testified that when Rollins selected the photographs of the individuals he had seen and described the actions each one had taken, he told witness that David Hartsfield was the youth at the back of the house. According to the witness, Rollins never told him that Hartsfield switched places with anyone.

When the trial court directed a verdict on two of the murder counts, the defense rested. After hearing arguments, the trial court noted that although Rollins was impeached as to whether defendant or Hartsfield was in the backyard and as to whether all six men ran from the scene in a pack rather than splitting up, there was no impeachment of the testimony placing defendant at the scene nor of the testimony as to the words defendant spoke.

The trial court then found defendant not guilty of armed robbery because the State had not borne its burden of proof

with regard to that charge. The court found defendant guilty of burglary, noting that the State had proven beyond a reasonable doubt that defendant, or those for whose conduct he was responsible, entered the home with the intent to commit a theft; the court noted that the amended charge suggested an attempt to commit an armed robbery, but stated that it could find defendant guilty of the offense of burglary based on the intent it found evident from the evidence. As to home invasion, the court found that defendant and his companions believed the premises were occupied, forced entry with a crowbar and intentionally injured deceased within his dwelling by stabbing him with a knife, but the court could not say that they were armed with a dangerous weapon when they entered; the court therefore found defendant guilty only of one count of home invasion. Although there were three remaining murder counts, the court noted that as to the two remaining counts on which it had not directed a finding, it found that deceased was fatally stabbed during the course of a burglary carried out by defendant and his companions. The court then summarized that it was finding defendant guilty of murder under count 4 (felony-murder based on burglary), home invasion under count 6, and burglary under the amended count 8, but that it would not enter judgment on the home invasion conviction because that offense merged with the murder conviction.

Nevertheless, at sentencing, the trial court imposed a 25-year sentence on the home invasion charge to be served concurrently with defendant's sentence for murder, and a 30-year sentence for murder to be served consecutive "to any sentence you receive in other cases." The court imposed no sentence for burglary.

The mittimus shows that defendant was convicted of two counts of murder, for which he received concurrent 30-year terms and one court of home invasion for which he received

a concurrent 25-year term. The mittimus further states that the sentences are to run consecutive to "any other sentences received by this defendant."

Similarly, the memorandum of court orders (half-sheet) shows that defendant was found guilty of murder under both counts 4 and 5 (felony-murder based on home invasion), home invasion under count 6 and burglary under count 8, as amended. The half-sheet further records defendant's sentence as a 30-year concurrent term for each count of murder and a 25-year concurrent time for home invasion with the sentences to rune consecutively to any other sentences received by defendant.

We consider first defendant's contention that his conviction for burglary must be reversed where the trial court specifically found that the State failed to prove beyond a reasonable doubt the intent alleged in the indictment. The indictment, as amended, charged defendant with burglary in that he knowingly and without authority entered deceased's home with intent to commit therein an armed robbery. In announcing its factual findings, the trial court found defendant not guilty of armed robbery because the State had not borne its burden of proof as to that charge but found defendant guilty of burglary because the State had proved beyond a reasonable doubt that defendant or his accomplices entered the home with the intent to commit therein a theft.

This case is distinguishable from *People v. Zuniga* (1981), 99 Ill. App. 3d 396, 425 N.E.2d 1094, cited by the State, because the trial court here specifically found defendant not guilty of armed robbery. Although this would not necessarily preclude a conviction of burglary with the intent to commit an armed robbery, the trial court here found that defendant entered the home with the intent to commit therein a theft, and further stated that although the charge suggested an intent to commit an armed robbery, it could find

defendant guilty of burglary based on the intent it found from the evidence. Theft is generally not viewed as a lesser-included offense of robbery because theft is an intended, unauthorized deprivation of the benefit or use of property, while robbery is the use of force in the taking of property, regardless of intent or the anticipated duration of the taking. (*People v. McCarty* (1983), 94 Ill. 2d 28, 445 N.E.2d 298.) Here, as in *People v. Toolate* (1984), 101 Ill. 2d __01, 461 N.E.2d 987, defendant was not charged with burglary with the intent to commit theft, and cannot, therefore, be convicted of that offense.

Nevertheless, the trial court entered judgment upon defendant's conviction for murder during the commission of a burglary. In this case, the court of the indictment charging murder during the commission of a burglary did not specify the nature of the burglary. There was only one count of the amended indictment alleging burglary and that alleged a burglary with the intent to commit armed robbery. A multiple-count indictment should be read as a whole. (*People v. Hall* (1982), 96 Ill. 2d 315, 450 N.E.2d 309.) Because the underlying conviction, a burglary with the intent to commit armed robbery, cannot be sustained in this case, defendant's felony-murder conviction based on that underlying felony (count 4) cannot be sustained. *See People v. Frias* (1983), 99 Ill. 2d 193, 457 N.E.2d 1233.

Defendant also contents that the trial court erred in granting the State leave to amend the indictment in such a manner as to change the offense charged, *i.e.*, burglary. Because we are reversing the conviction based upon the amended charge (count 4), there is no prejudice to defendant, and we need to consider this argument further. Similarly we need not consider defendant's contention that his felony-murder conviction based upon burglary must be vacated where the indictment was a nullity, and there was no formal

notice to amend the indictment or a ruling on an implied motion to amend the indictment.

Defendant further argues that the trial court erred in issuing a mittimus showing that he was convicted of two counts of murder where the court only made a finding on count 4 which alleged felony murder based on burglary. We note that the half-sheet shows the defendant was found guilty of murder under both count 4 and count 5; the latter count alleged felony murder based on home invasion. In addition, the court, in announcing its findings, stated that it would not enter judgment on the home invasion conviction because that offense merged with the murder conviction.

The rule is that in determining the sufficiency of a judgment of conviction the entire record will be searched, and all parts of the record interpreted together. A deficiency in one place may be cured by what appears in another. (*People v. Brand* (1953), 415 Ill. 329, 114 N.E.2d 370.) Although the oral statement made by a trial judge relative to his conclusions and the sentence to be imposed is the judgment, that does not mean that the statement need be in the exact words of the formal judgment as finally recorded. *Johnson v. People* (1959), 16 Ill. 2d 478, 158 N.E. 2d 42.

We find that the entire record in this case, including the trial court's statement that the home invasion conviction merged with the murder conviction, shows that defendant was convicted of felony murder based on home invasion under count 5, in addition to felony murder under count 4, as reflected in the half-sheet and the mittimus. There can be only one conviction for murder where only one individual was killed. (*People v. Mack* (1984), 105 Ill. 2d 103, 473 N.E.2d 880.) However, as previously discussed herein, we are reversing defendant's conviction under count 4. Therefore, the conviction for murder based on home invasion will be affirmed. Because defendant's conviction for home

invasion under count 6 is a lesser-included offense of his felony-murder conviction, his conviction of a lesser-included offense must be vacated. *People v. Jordan* (1983), 116 Ill. App. 3d 269, 452 N.E.2d 93; *People v. Define* (1981), 98 Ill. App. 3d 914, 424 N.E. 2d 823, *cert. denied* (1982), 458 U.S. 1109, 73 L. Ed. 2d 1371, 102 S. Ct. 3490.

Defendant next contends that he was denied his constitutional right to effective legal representation due to the failure of his counsel to comply with the discovery rules, to impeach the State's only eyewitness, and to object to improper amendment of the indictment. We cannot agree.

In order to establish ineffective assistance, a defendant must first show that counsel committed errors so serious that he was not functioning as "counsel" guaranteed defendant by the sixth amendment, and, in addition, that those errors, in fact, were prejudicial to his defense. (*Strickland v. Washington* (1984), 466 U.S. ___, 80 L. Ed. 2d 674, 104 S. Ct. 2052; *People v. Collins* (1985), 106 Ill. 2d 237, 478 N.E.2d 267.) Because a it is all too easy to second-guess an attorney's performance, judicial scrutiny of counsel's performance must be highly deferential and counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable, professional judgment. *Strickland v. Washington*; *People v. Collins*.

Defendant first contents that counsel's failure to move to dismiss or object to the improper amendment of two void counts of the indictment prejudiced him. We need not consider this argument further because, as previously discussed, we are reversing the conviction based upon the amended indictment, and, hence, there is no prejudice to defendant.

Defendant further contends that counsel's failure to comply with applicable discovery rules and to impeach the

only witness to testify that he was on the crime scene deprived him of a meaningful trial. Although the right to effective assistance of counsel is well established, a defendant is entitled to a fair trial, not a perfect one. (*People v. Key* (1984), 122 Ill. App. 3d 491, 461 N.E.2d 517.) Failure to impeach a witness does not necessarily indicate incompetence of counsel. (*See People v. Kubat* (1983), 94 Ill. 2d 437, 447 N.E.2d 247; *People v. Hilliard* (1982), 109 Ill. App. 3d 797, 441 N.E.2d 135.) Moreover, defendant cannot demonstrate prejudice from defense counsel's failure to comply with discovery rules because the trial court did not impose the sanction of excluding all reference to matters contained in the notes. In addition, the record shows that defense counsel did impeach Caston Rollins by obtaining from him an admission that he told Officer O'Connor that David Hartsfield was in back of the house and eliciting from Officer O'Connor testimony that Rollins never told him that Hartsfield switched places with anyone.

Defendant next contends that the only evidence tending to place defendant near the crime scene was the testimony of a 12-year-old, and hence the State failed to prove him guilty beyond a reasonable doubt. However, the testimony of one witness, if positive and credible, is sufficient to sustain a conviction. (*People v. Pratt* (1983), 114 Ill. App. 3d 876, 449 N.E.2d 1044.) Minor inconsistencies in a witness's testimony affect only his credibility and the weight to be given the testimony, and a trier of fact may find such testimony credible despite inconsistencies. (*People v. Spencer* (1983), 119 Ill. App. 3d 971, 457 N.E.2d 473.) The trier of fact may accept all, part or none of the evidence presented t trial, and its determination should be disturbed on review unless it is so contrary to the evidence as to raise reasonable doubt as to defendant's guilt. *People v. Banks* (1984), 121 Ill. App. 3d 279, 459 N.E.2d 992.

The evidence in this case was not entirely circumstantial. Caston Rollins testified that he saw defendant order two youths to try to get inside the front door and order another youth with a wire cutter to the back of the deceased's home; when the latter returned, he reported that the wires were cut. Rollins also saw four of the youths thereafter enter the home after a crowbar was used on the door and all of the youths then run from the scene with one of the youths, who had been inside the home, carrying a television set. Although Rollins' testimony was impeached in some respects, nothing to which he testified was inconsistent with defendant's presence on the scene issuing orders to his companions to break into deceased's home. Under the circumstances, we believe the trial court's findings were not so insufficient or unsatisfactory as to raise a reasonable doubt of defendant's guilt.

Defendant finally contends that where the trial court imposed sentences consecutively to those in any other cases, the mittimus reflecting that order should be amended to delete this language because it fails to clearly define the limits of the sentence imposed. The duty of the trial court is to make his intention clear and positively identify the sentences involved. (*People v. Freeman* (1981), 95 Ill. App. 3d 297, 420 N.E.2d 163.) Where the order fails to clearly define the limits of sentences to run consecutively, the cause must be remanded to clarify the sentences. *People v. Thompson* (1983), 114 Ill. App. 3d 662, 449 N.E. 2d 159.

At sentencing, the State noted defendant's extensive criminal background and argued in aggravation that defendant had recently received a 120-year sentence for convictions of home invasion, armed robbery and aggravated battery involving severe injuries to two elderly women; defendant had also received a four-year sentence following a plea of guilty for burglary and robbery in 1982. Although

the presentence report states that there are no other known charges pending against defendant in the circuit court of Cook County, the trial court's language that defendant's sentence was to be served "consecutive to any sentences that you receive in other cases," would appear to apply to any sentences he received in the future as well as those sentences he has already received. Hence, unlike the circumstances in *People v. Freeman*, *People v. Gutierrez* (1982), 105 Ill. App. 3d 1059, 433 N.E.2d 361, and *People v. Green* (1980), 83 Ill. App. 3d 982, 404 N.E.2d 930, the court's language not only failed to specify what sentences the instant sentences were to be served consecutively to but its ambiguity prevents us from determining from the record that it refers to the previous sentences.

Accordingly we affirm defendant's conviction of murder under count 5, reverse his convictions under counts 4 and 8, vacate his home invasion conviction under count 6, and remand this cause to the trial court for amendment of the mittimus to clarify the consecutive nature of the sentence for murder under count 5.

Pursuant to *People v. Nicholls* (1978), 71 Ill. 2d 166, 374 N.E.2d 194, we grant the State's request that defendant be assessed $50 as costs for the State's defending this appeal and incorporate it as part of the judgment.

Dated at Chicago, Illinois, this 3rd day of October, 1985.

Appendix G

Circuit Court of Cook County, Illinois, Criminal Division

PEOPLE OF THE STATE OF ILLINOIS

v.

BRIAN TRIPLETT

Case No. 83 C 4356

TRIAL VERDICT

Reporter's Official Transcript of proceedings

January 25, 1984

Before Honorable Stephen A. Schiller

****

Page 182

****

THE COURT: The evidence that I have heard in this case is largely circumstantial. The testimony of the witnesses, to the extent that they enter into my judgement in this case, consists of several parts. First, the life and death testimony of the victim's daughter, Mrs. Hansen, that Mr. Knight was alive the evening of the 23rd; second, that he died some time between the time she last spoke to him and the early afternoon of December 24th when she viewed his body.

We have had the testimony stipulated to of the Medical Examiner that establishes the cause of death as being two

stab wounds to the chest. We have occurring within the time period that Mrs. Hansen has spoke to her father and her viewing his body and observation made by Caston Rollins of six young men in the area of the decedent's home.

Mr. Rollins relates that person identified by him as Mr. Triplett, a man who he had seen, a person he had seen several times in the neighborhood along with several of the others he had seen several times in the neighborhood, but Mr. Triplett specifically ordered one of the young men to go and cut the telephone wires and another two of the men to maintain watch, one in the front of the house and one in the back of the house.

He further testified that one of the young men using a crowbar, a crowbar-type device, pried at the side door entering into the kitchen area while another was told to try the front door. We have his further testimony that the young man who was instructed to cut the wires came back to Mr. Triplett and was overheard to say that the wires had been cut.

We have the entry of four of the young men, excluding Mr. Triplett, entering the home through the side door, Mr. Triplett remaining to the rear of the house. We have their exiting, one carrying a television set, running down the street past Mr. Rollins, one of them relating to Mr. Rollins not to say anything about this, that the television set had been taken on the railroad tracks, while the two people had been standing outside of the home following the entry ran down the alley.

There has been impeachment offered as to whether, indeed, Mr. Rollins had previously placed Mr. Triplett in the back yard or Mr. Hartsfield in the back yard. There is additional impeachment offered through the testimony of Mr. Reml that all six men ran from the scene in a pack, specifically reducing the suggestion that any of them ran down the alley in one direction and four in the other.

There is really no impeachment of the testimony that places Mr. Triplett at the scene, nor of the words that he testified were related to him. There is no direct evidence in this case. The burden of proof, as Mr. Kadish has related, is proof beyond a reasonable doubt. Where the evidence is all circumstantial in nature it must be such as to permit no other reasonable explanation other than that urged by the State. It is an I. P. I. jury instruction. It is an instruction that relates the law to juries. It is also a statement of the law, and as a statement of the law applies to judges sitting without a jury as well.

There are not two separate standards, a standard for juries and a standard for judges. The standard with regard to the burden of proof and evidence necessary to convict is the same. That being said, in reviewing the charges that have been tried, I must draw inferences that are compelled rather than those that are directed because this is no direct evidence.

I cannot say that the State has borne its burden of proof with regard to the charge of Armed Robbery, therefore, I find the defendant not guilty of the offense of Armed Robbery. With regard to the offense of Burglary, I believe the State has proven beyond a reasonable doubt that the defendant, or those whose conduct he's responsible for, entered Mr. Knight's home, removed property therefrom. I think it is fairly clear that he entered with the intent to commit therein a Theft.

The amended charge of Burglary before me suggests an attempt to commit an Armed Robbery. I think under the law I can find the defendant guilty of the offense of Burglary based on the intent I find evident from the evidence that I have heard. Accordingly, Mr. Triplett, I find you guilty of the offense of Residential Burglary -- I'm sorry. -- Burglary.

With regard to the count of Home Invasion, I have no doubt that by virtue of the conduct described, the cutting of

the telephone wires, that Mr. Triplett and his companions believed the home that they entered, forced entry into with a crowbar, according to the testimony that I have heard, believed that the premises were occupied. I cannot say based on the evidence that I have heard that at the time they entered they were armed with a dangerous weapon. Accordingly, with regard to the second Home Invasion count, which depends on that element, I just find the defendant not guilty.

With regard to the third count of Home Invasion that's predicated on the intentional injury of Edward Knight within his dwelling place by stabbing him with a knife, I think the State has borne its burden of proof. I think it is clear that the nature of the injuries were such as to indicate that they were intentionally inflicted and the circumstances suggest that it was someone within the group of young men that Mr. Triplett was with involved in a Burglary who inflicted that injury. Accordingly, I find you guilty of the offense of Home Invasion as charged in the first Home Invasion Count.

With regard to the remaining two Murder counts, those that I have not directed a finding on at the conclusion of the State's case, I find that Edward Knight was stabbed and killed during the perpetration of a Burglary being carried out by Mr. Triplett and his companions. Accordingly, I find you guilty of the offense of Murder as being charged in Court Four of the Indictment.

In summary, I find the defendant guilty of Murder under Count Four, Home Invasion under Count Five -- I'm sorry. -- Count Six, and Burglary under the amended count of the Indictment. With regard to the Home Invasion, I enter no judgement because I think the Home Invasion, as the defendant has been convicted here, merges with the Murder conviction.

I'll order a presentence investigation be conducted

and set this matter for sentencing on March 1st. Is there anything further, gentlemen?

Appendix H

STATUTORY PROVISION INVOLVED

Title 28. Judiciary and Judicial Procedure

Part VI, Chapter 153. Habeas Corpus

§ 2244. Finality of determination

(a) No Circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for

constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an

asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Appendix I

STATUTORY PROVISION INVOLVED

Title 28. Judiciary and Judicial Procedure

Part VI, Chapter 153. Habeas Corpus

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral postconviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.